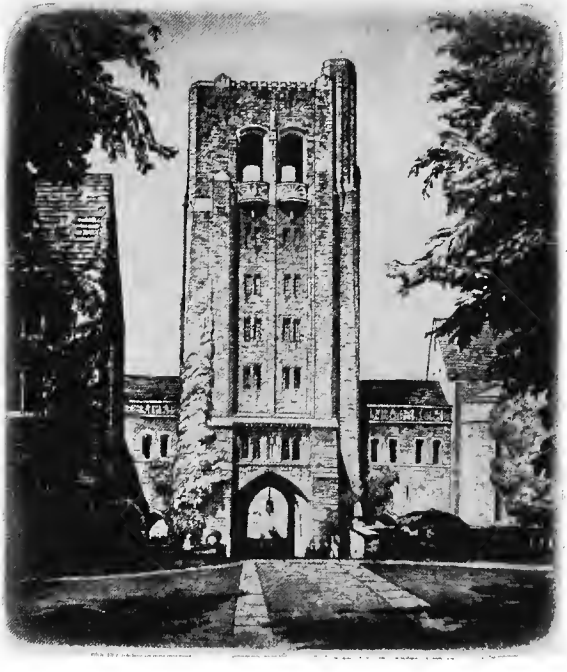
MANUAL COURTS MARTIAL 1918



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A MANUAL

of

COURTS MARTIAL

U. S. ARMY

REPRINT OF

CHAPTERS I TO VIII INCLUSIVE

CHAPTER XIII

ARTICLES OF WAR—APPENDIX 1

CHARGE SHEET—APPENDIX 3

ABBREVIATIONS.

A. R.	Army Regulations, 1913.
A.W.	Articles of War, Code of 1916.
Bishop	Bishop's New Criminal Law, 8th edition.
Clark	Clark's Criminal Law, 2d edition.
Clark and Marshall	The Law of Crimes, 2d edition.
Cyc.	Cyclopedia of Law and Procedure.
Davis	A Treatise on the Military Law of the United States, 2d edition.
Digest	Digest of Opinions of Judge Advocates General of the Army, 1912.
Dudley	Military Law and Procedure of Courts-Martial, 1910.
Greenleaf	Law of Evidence, 16th edition.
R. S.	Revised Statutes of the United States, 1878.
Thompson	Law of Trials.
Wharton	Criminal Law, 9th edition.
Wigmore	Law of Evidence.
Wigmore, P. C.	Pocket Code of Evidence.
Winthrop	Military Law and Precedents, 2d edition, 1896.

CHAPTER I.

MILITARY JURISDICTION.

SECTION I.

SOURCE AND KINDS OF MILITARY JURISDICTION.

1. Source.—The source of military jurisdiction is the Constitution, the specific provisions relating to it being found in powers granted to Congress, in the authority vested in the President, and in a provision of the fifth amendment.

2. Kinds.—Military jurisdiction is of four kinds, viz:

(a) **Military government** (the law of hostile occupation); that is, military power exercised by a belligerent by virtue of his occupation of an enemy's territory, over such territory and its inhabitants. This belongs to the law of war and therefore to the law of nations. When a conquered territory is ceded to the conqueror, military government continues until civil government is established by the new sovereign.

(b) **Martial law at home** (or, as a domestic fact); by which is meant military power exercised in time of war, insurrection, or rebellion in parts of the country retaining their allegiance, and over persons and things not ordinarily subjected to it.

(c) **Martial law applied to the Army;** that is, military power extending in time of war, insurrection, or rebellion over persons in the military service, as to obligations arising out of such emergency and not falling within the domain of military law, nor otherwise regulated by law.

The last two divisions (*b*) and (*c*) are applications of the doctrine of necessity to a condition of war. They spring from the right of national self-preservation.

(d) **Military law;** which is the legal system that regulates the government of the military establishment. It is a branch of the municipal law, and in the United States derives its existence from special constitutional grants of power. It is both written and unwritten. The sources of written military law are the Articles of War enacted by Congress August 29, 1916; other statutory enactments relating to the military service; the Army Regulations; and general and special orders and decisions promulgated by the War Department and by department, post, and other commanders. The unwritten military law is the "custom of war," consisting of customs of service, both in peace and war.

This Manual deals primarily with military law.

SECTION II.

EXERCISE OF MILITARY JURISDICTION.

3. Military tribunals.—Military jurisdiction is exercised through the following military tribunals:

(a) **Military commissions and provost courts,** for the trial of offenders against the laws of war and under martial law.

(b) **Courts-martial.—general, special, and summary**—for the trial of offenders against military law. (A. W. 3.)

[NOTE 1.—The general court-martial has concurrent jurisdiction with military commissions and provost courts to try offenders against the laws of war. (A. W. 12.)

NOTE 2.—For the authority to appoint courts-martial in the National Guard not in the service of the United States, and the jurisdiction and powers of such courts, see sections 102–108, act of June 3, 1916, 39 Stat., 208, 209; Appendix 2, post.]

(c) **Courts of inquiry,** for the examination of transactions of or accusations or imputations against officers or soldiers. (A. W. 97.)

[NOTE.—The composition, jurisdiction, procedure, etc., of these tribunals are treated in the succeeding chapters of this Manual.]

SECTION III.

PERSONS SUBJECT TO MILITARY LAW.

4. Classes enumerated.—The following persons are subject to the Articles of War (A. W. 2):

[NOTE.—Wherever the following words are used in the Articles of War or this Manual, they are to be construed in the sense indicated below, unless the

context shows that a different sense is intended, viz: (*a*) The word "officer" shall be construed to refer to a commissioned officer; (*b*) the word "soldier" shall be construed as including a noncommissioned officer, a private, or any other enlisted man; (*c*) the word "company" shall be understood as including a troop or battery; and (*d*) the word "battalion" shall be understood as including a squadron. (A. W. 1.)]

(*a*) All officers and soldiers belonging to the Regular Army of the United States; all volunteers, from the dates of their muster or acceptance into the military service of the United States; and all other persons lawfully called, drafted, or ordered into, or to duty, or for training in the said service, from the dates they are required by the terms of the call, draft, or order to obey the same.

[NOTE.—(*a*) *Regular Army.*—The Regular Army of the United States, including the existing organizations, shall consist of sixty-four regiments of Infantry, twenty-five regiments of Cavalry, twenty-one regiments of Field Artillery, a Coast Artillery Corps, the brigade, division, army corps, and army headquarters, with their detachments and troops, a General Staff Corps, an Adjutant General's Department, an Inspector General's Department, a Judge Advocate General's Department, a Quartermaster Corps, a Medical Department, a Corps of Engineers, an Ordnance Department, a Signal Corps, the officers of the Bureau of Insular Affairs, the Militia Bureau, the detached officers, the detached noncommissioned officers, the chaplains, the Regular Army Reserve, all organized as hereinafter provided, and the following as now authorized by law: The officers and enlisted men on the retired list; the additional officers; the professors, the Corps of Cadets, the general army service detachment, and detachments of Cavalry, Field Artillery, and Engineers, and the band of the United States Military Academy; the post non-commissioned staff officers; the recruiting parties, the recruit depot detachments, and unassigned recruits; the service school detachments; the disciplinary guards; the disciplinary organizations; the Indian Scouts; and such other officers and enlisted men as are now or may be hereafter provided for. (Sec. 2, act of June 3, 1916, 39 Stat., 166.)

(*b*) *Volunteers.*—The volunteer forces shall be subject to the laws, orders, and regulations governing the Regular Army in so far as such laws, orders, and regulations are applicable to officers or enlisted men whose permanent retention in the military service, either on the active list or on the retired list, is not contemplated by existing law. (Sec. 4, act of Apr. 25, 1914, 38 Stat., 347.)

(*c*) *National Guard.*—The National Guard, when called as such into the service of the United States, shall, from time to time they are required by the terms of the call to respond thereto, be subject to the laws and regulations governing the Regular Army, so far as such laws and regulations are applicable to officers and enlisted men whose permanent retention in the military service, either on the active list or on the retired list, is not contemplated by existing law. (Sec. 101, act of June 3, 1916, 39 Stat., 208.)

[NOTE.—The militia when called into the service of the United States is also subject to military law. (35 Stat., 399.)]

(*d*) *National Guard when drafted into Federal service.*—Members of the National Guard and the National Guard Reserve drafted into the military service of the United States shall, from the date of their draft, stand discharged from the militia, and shall from said date be subject to such laws and regulations for the government of the Army of the United States as may be applicable to members of the Volunteer Army. (Sec. 111, act of June 3, 1916, 39 Stat., 211.)

(*e*) *Officers' Reserve Corps.*—Any officer who, while holding a commission in the Officers' Reserve Corps, shall be ordered to active service by the Secretary of War shall, from the time he shall be required by the terms of his order to obey the same, be subject to the laws and regulations for the government of the Army of the United States, in so far as they are applicable to officers whose permanent retention in the military service is not contemplated. (Sec. 38, act of June 3, 1916, 39 Stat., 190.)

(*f*) *The Enlisted Reserve Corps.*—Any enlisted man of the Enlisted Reserve Corps ordered to active service or for purposes of instruction or training shall, from the time he is required by the terms of the order to obey the same, be subject to the laws and regulations for the government of the Army of the United States. (Sec. 55, act of June 3, 1916, 39 Stat., 195.)]

(*b*) Cadets.

(*c*) Officers and soldiers of the Marine Corps when detached for service with the armies of the United States by order of the President. (A. W. 2.)

(*d*) Officers and enlisted men of the Medical Department of the Navy, serving with a body of marines detached for service with the Army in accordance with the provisions of section sixteen hundred and twenty-one of the Revised Statutes, shall, while so serving, be subject to the rules and articles of war prescribed for the government of the Army in the same manner as the officers and men of the Marine Corps while so serving. (Act of Aug. 29, 1916, 39 Stat., 573.)

[*Note.*—(*a*) Except as provided in (*c*) and (*d*) supra or otherwise specifically provided by law, the Articles of War do not apply to any person under the United States naval jurisdiction. (*b*) An officer or soldier of the Marine Corps detached for service with the Army may be tried by military court-martial for an offense committed against the laws for the government of the naval service prior to his detachment and for an offense committed against the Articles of War he may be tried by a naval court-martial after such detachment ceases. (A. W. 2.)]

(*e*) All retainers to the camp and all persons accompanying or serving with the armies of the United States *without* the territorial jurisdiction of the United States, and *in time of war* all such retainers and persons accompanying or serving with the armies of the United States in the field, *both within and without* the territorial jurisdiction of the United States though not otherwise subject to the Articles of War.

[NOTE.—In addition to the two classes (*a*) "retainers to the camp" and (*b*) "persons serving with the armies of the United States in the field" who were made subject to military jurisdiction by A. W. 60 of the code of 1806 (A. W. 63 of the revision of 1874), A. W. 2 of the code of 1916 includes a third class, viz, (*c*) "persons accompanying the armies of the United States."]

(*f*) All persons under sentence adjudged by courts-martial.

(*g*) Army field clerks.

[NOTE.—Hereafter headquarters clerks shall be known as Army field clerks and shall * * * be subject to the rules and Articles of War. (Sec. 1, act of Aug. 29, 1916, 39 Stat., 625.)]

(*h*) Field clerks, Quartermaster Corps.

[NOTE 1.—Hereafter not to exceed two hundred clerks, Quartermaster Corps, * * * shall be known as field clerks, Quartermaster Corps, * * * and shall be subject to the rules and Articles of War. (Act of Aug. 29, 1916, 39 Stat., 626.)]

[NOTE 2.—Inmates of the Soldiers' Home (R. S. 4824), the National Home for Disabled Volunteer Soldiers (R. S. 4835), all persons admitted to treatment in the General Hospital at Fort Bayard, New Mexico, while patients in said hospital (act of June 12, 1906, 34 Stat., 255), and all persons admitted to treatment in the Army and Navy General Hospital at Hot Springs, Arkansas, while patients in said hospital (act of Mar. 3, 1909, 35 Stat., 748), are by the statutes cited made subject to the rules and articles for the government of the armies of the United States, but court-martial jurisdiction over them has rarely, if ever, been exercised.]

CHAPTER II.

COURTS-MARTIAL—CLASSIFICATION—COMPOSITION.

SECTION I.

CLASSIFICATION.

5. Kinds.—Courts-martial shall be of three kinds (A. W. 3), viz:

(a) General courts-martial;

(b) Special courts-martial; and

(c) Summary courts-martial.

[NOTE.—The classification of courts-martial adopted by the code of 1916 is identical with that made by the act of March 2, 1913 (37 Stat., 721), which abolished garrison and regimental courts-martial and created special courts martial.]

SECTION II.

COMPOSITION.

6. Who competent to serve.—All officers in the military service of the United States, and officers of the Marine Corps when detached for service with the Army by order of the President, shall be competent to serve on courts-martial for the trial of any persons who may lawfully be brought before such courts for trial. (A. W. 4.)

Exceptions.—(*a*) No officer shall be eligible to sit as a member of a general or special court-martial when he is the accuser or a witness for the prosecution (A. W. 8, 9); but when there is only one officer present with a command he shall be the summary court-martial of that command and shall hear and determine cases brought before him (A. W. 10). [See chapter 8, sec. 1, par. 129.] (*b*) Chaplains, veterinarians, dental surgeons, and second lieutenants in the Quartermaster Corps are not in practice detailed as members of courts-martial.

7. Number of members.—Courts-martial shall be composed of the following number of officers (A. W. 5, 6, 7), viz:

(a) **General courts-martial.**—Any number from 5 to 13, inclusive.

A general court-martial shall not consist of less than 13 officers when that number can be convened without manifest injury to the service. (A. W. 5.) The Articles of War (A. W. 5, 6) governing the number of members which may sit upon a general or a special court-martial are merely directory to the officer appointing the court, and his decision as to the number which can be convened without manifest injury to the service (within the maximum and minimum limits prescribed by law), being a matter submitted to his sound discretion, must be conclusive. (Martin *v.* Mott, 12 Wheaton, 35; see also Mullan *v.* U. S., 140 U. S., 240.) While a number less than five can not be organized as a *general* court-martial or proceed with a trial, they may perform such acts as are preliminary to the organization and action of the court. Less than five members may adjourn from day to day, and where five are present and one of them is challenged, the remaining four may determine upon the sufficiency of the objection. A court reduced to four members and thereupon adjourning for an indefinite period does not dissolve itself. The appointing authority may at any time complete it by the addition of a new member or members and order it to reassemble for business. (Digest, p. 158, LXXV, B, 3), but if any evidence has been taken before the court is reduced below five, it should be dissolved and a new one ordered.

If for any reason a general court-martial is reduced below five members it will direct the judge advocate to report the facts to the convening authority and wait his orders. The report by the judge advocate will, in all cases, be made through the commanding officer

of the post, command, or station where the court is sitting, who will indorse thereon the names of a sufficient number of available officers whom he recommends be detailed on the court to enable it to proceed. More than enough to make a quorum should be recommended where practicable in order to provide for future contingencies, and so far as can be foreseen the officers recommended should not be liable to challenge in any case to be tried. If there be no such officer or officers available, the commanding officer will so state. This report will be made by wire whenever deemed advisable in order to prevent unnecessary delay in trying cases. Similar action will be taken before trial by the judge advocate and commanding officer whenever the former knows or has good reason to believe that the court will be reduced below a quorum at the time of trial. It is the duty of commanding officers to keep in touch with the business before general courts-martial being held within the limits of their commands and from time to time to take the initiative in making recommendations to the appointing authority as to relieving or adding members, changing the judge advocate, or appointing a new court, and as to other matters relating to such courts, so that they may proceed expeditiously and in cooperation with other official business.

(b) **Special courts-martial.**—Any number of officers from three to five, inclusive.

The remarks under (a) *ante* apply equally to a special court-martial where its membership is reduced below the minimum required by law, except that in the case of special court-martial the report by the judge advocate will be made to the convening authority, who will, without unnecessary delay, *detail a sufficient number of qualified officers to enable it to proceed or appoint a new court.*

(c) **Summary courts-martial.**—A summary court-martial shall consist of one officer. (*C. M. C. M., No. 1.*)

8. "Officer" defined.—The word "officer" when used in the Articles of War or this Manual means commissioned officer. (A. W. 1.)

9. "In the military service of the United States."—(*a*) An officer suspended from rank should not be detailed to sit as a member of a court-martial during the period of suspension.

(*b*) A retired officer may be assigned with his consent to active duty upon courts-martial in time of peace (act of Apr. 23, 1904, 33 Stat., 264), and if employed on active duty in time of war in the discretion of the President (sec. 24, act of June 3, 1916, 39 Stat., 183), he is eligible for court-martial duty. At other times he is not available for such duty except that when placed in command of a post under the act of August 29, 1916 (39 Stat., 627), or when assigned to recruiting duty he may act as summary court-martial when he is the only officer present. (See pars. 26 and 27.)

(*c*) Volunteers become eligible for duty as members of courts-martial from the dates of their muster or acceptance into the military service of the United States (A. W. 2), members of the Officers' Reserve Corps ordered to active service by the Secretary of War (sec.

38, act of June 3, 1916, 39 Stat., 191), and all other officers lawfully called, drafted, or ordered into, or to duty or for training in, the said service, from the date they are required by the terms of the call, draft, or order to obey the same (A. W. 2).

10. Marine officers.—Marine officers can be detached for duty with the Army only by order of the President (R. S. 1619, 1621), and their eligibility to sit as members of courts-martial to try persons subject to military law continues only during the time they are serving under such order. When any part of the Marine Corps is present with the Army and engaged in a common enterprise with it, without an order of the President detaching it for service with the Army, the case is one of cooperation and not of incorporation, and in such a case no officer of the Marine Corps can exercise command over the Army any more than a naval officer can when some part of the Navy is cooperating with the Army, and the converse is true of Army officers cooperating with the Marine Corps. (28 Op. Atty. Gen., 15.)

11. No distinction between Regulars and other forces.—No distinction now exists in the matter of eligibility for court-martial duty among the various classes of officers in the military service of the United States for the trial of any person subject to military law. (Act of Apr. 25, 1914, 38 Stat., 348; A. W. 4.)

12. Rank of members.—(*a*) The order appointing a general or a special court-martial should name the members in order of rank, and they will sit according to rank.

In no case shall an officer, when it can be avoided, be tried by officers inferior to him in rank. (A. W. 16.). This provision (like that in reference to the number of members of a general or special court-martial considered in paragraph 7, *ante*) is not prohibitory but directory only upon the convening authority. Its effect is to leave to the discretion of that officer, as the *conclusive* authority and judge, the determination of the question of the rank of the members, with only the general instruction that superiors in rank to the accused shall be selected, so far as the exigencies and interests of the service will permit. (Mullan *v.* U. S., 140 U. S., 240.)

(**b**) Rank among officers of the Regular Army, forces drafted or called into the service of the United States, and Volunteers is determined according to the rules laid down in A. W. 119.

13. Who may be tried.—(*a*) For the jurisdiction of general, special, and summary courts-martial as to persons see Chapter IV, Jurisdiction.

(*b*) In addition to the persons subject to military law enumerated in Chapter I, Section III, *ante*, the general court-martial also has jurisdiction over *any other person* who by the law of war is subject to trial by military tribunals. (A. W. 12; see Chap. IV, Jurisdiction.)

CHAPTER III.

COURTS-MARTIAL—BY WHOM APPOINTED.

SECTION I.

GENERAL COURTS-MARTIAL.

14. Authorities enumerated.—General courts-martial may be appointed by the following authorities (A. W. 8), viz:

(*a*) The President of the United States.
(*b*) The commanding officer of a territorial division.
(*c*) The commanding officer of a territorial department.
(*d*) The Superintendent of the Military Academy.
(*e*) The commanding officer of an army.
(*f*) The commanding officer of an army corps.

(*g*) The commanding officer of a (tactical) division.

(*h*) The commanding officer of a separate brigade.

(*i*) The commanding officer of any district or of any force or body of troops, when empowered by the President to do so.

Exceptions.—(1) When any of the foregoing commanders is the accuser or the prosecutor of the person or persons to be tried, the court shall be appointed by superior *competent* authority; (2) the Superintendent of the Military Academy is not empowered to convene a general court-martial for the trial of an officer. (A. W. 12.)

[NOTE.—For the authority to appoint general court-martial in the National Guard not in the service of the United States, see sec. 103 act of June 3, 1916, 39 Stat., 208; Appendix 2, *post*.]

15. Power of the President to appoint.—In addition to the general statutory authority conferred upon the President by A. W. 8 to appoint general courts-martial he is also empowered to do so by virtue of being Commander in Chief of the Army (Swain *v.* U. S., 165 U. S., 563) and in the particular case provided for by R. S. 1230.

[NOTE.—When any officer, dismissed by order of the President, makes, in writing, an application for trial, setting forth, under oath, that he has been wrongfully dismissed, the President shall, as soon as the necessities of the service may permit, convene a court-martial to try such officer on the charges on which he shall have been dismissed. And if a court-martial is not so convened within six months from the presentation of such application for trial, or if such court, being convened, does not award dismissal or death as the punishment of such officer, the order of dismissal by the President shall be void. (R. S. 1230.) See also A. W. 118.]

16. Superintendent of the Military Academy.—The Superintendent of the Military Academy was authorized by R. S. 1326 to convene general courts-martial for the trial of cadets only; the act of March 2, 1913 (37 Stat., 722), extended this authority to include all persons (except officers) subject to military law under his command. This authority was continued in the Code of 1916. (A. W. 8, 12.)

17. "Accuser" or "prosecutor."—Whether the commander who convened the court is to be regarded as the "accuser or prosecutor" where he has had to do with the preparing and preferring of the charges, is mainly to be determined by his *animus* in the matter. He may, like any other officer, *initiate* an investigation of an officer's conduct and formally prefer, as his individual act, charges against such officer; or by reason of a personal interest adverse to the accused he may adopt practically as his own charges initiated by another; in which cases he is clearly the accuser or prosecutor within the article. On the other hand, it is his duty to determine, when the facts are brought to his knowledge, whether an officer within his command charged with a military offense shall in the interest of discipline and for the good of the service be brought to trial. To this end he may formally refer or revise or cause to be revised and then formally referred, charges preferred against such officer by another;

or when the facts of an alleged offense are communicated to him, he may direct a suitable officer, as a member of his staff, or the proper commander of the accused, to investigate the matter, formulate and prefer such charges as the facts may warrant, and having been submitted to him, he may revise and refer them for trial as in other cases; all this he may do in the proper performance of his official duty without becoming the accuser or prosecutor in the case. Of course, he can not be deemed such accuser or prosecutor where he causes charges to be preferred and proceeds to convene the court by direction of the Secretary of War or a competent military superior. (Digest, p. 154, LXXII, I, 1.) It is not essential that the commander who convenes the court-martial for the trial of an officer should sign the charges to make him the "accuser or prosecutor" within the meaning of this article. Nor is the fact that they have been signed by another conclusive on the question whether the convening commander is the actual accuser or prosecutor. The objection that such commander is such, calls in question the legal constitution of the court, and while such objection, if known or believed to exist, should regularly be interposed at or before the arraignment it may be taken during the trial at any stage of the proceedings. If not admitted by the prosecution to exist, the accused is entitled to prove it like any other issue. (For decisions as to when the convening authority is the accuser or prosecutor, see Digest, p. 155, LXXII, I, 1, a; p. 155, LXXII, I, 2; p. 156, LXXII, I, 3, a; p. 156, LXXII, I, 3 a (1).)

18. **Power to appoint an attribute of command.**—As the authority to appoint general courts-martial is an attribute of *command*, a commanding officer can not delegate to another officer such as his adjutant or any other staff officer or subordinate the authority to appoint a court, detail an additional member, or relieve a member. If the authority to appoint a general court-martial is vested by law in a commanding officer he retains that authority, wherever he may be, so long as he continues to be such commanding officer. In the absence of orders or legislation, personal presence within the territorial limits of his department is not essential to the validity of commands given by a department commander to be executed within the department. Therefore he may appoint a court-martial while absent from his department *if he continues to exercise command.* But a department commander detached and absent from his command for any considerable period by reason of having received a leave of absence (whether of a formal or informal character), or having been placed upon a distinct and separate duty, is held to be in a status incompatible with a full and legal exercise of such authority and therefore incompetent during such absence to order a general court-martial as department commander, even though no other officer has been

assigned or has succeeded to the command of the department. (Digest, p. 153, LXXII, A.)

19. Rank of appointing authority.—The power of the various commanders enumerated in paragraph 14, *supra*, to appoint general courts-martial is independent of their rank, but no officer other than those enumerated can appoint a general court-martial no matter what his rank may be. An officer who succeeds to any command or duty stands in regard to his duties in the same situation as his predecessor. (A. R. 17.). In the event of the death or disability of the permanent commander of a territorial department, or his temporary absence from the limits of his command, the senior line officer present and on duty therein will exercise the command of the department, unless otherwise ordered, until relieved by proper authority. (A. R. 196.)

20. Power of appointing authority, how limited.—An officer who has power to appoint a court-martial may control its existence, dissolve it, and determine the cases to be referred to it for trial, but he can not control the exercise by the court of powers vested in it by law.

SECTION II.

SPECIAL COURTS-MARTIAL.

21. Authorities enumerated.—Special courts-martial may be appointed by the following authorities (A. W. 9), viz:

(*a*) The commanding officer of a district.
(*b*) The commanding officer of a garrison.
(*c*) The commanding officer of a fort.
(*d*) The commanding officer of a camp.
(*e*) The commanding officer of any place other than (*a*), (*b*), (*c*), and (*d*) where troops are on duty.
(*f*) The commanding officer of a brigade.
(*g*) The commanding officer of a regiment.
(*h*) The commanding officer of a detached battalion.
(*i*) The commanding officer of any other detached command.

Exception.—When any one of the foregoing commanding officers is the accuser or the prosecutor of the person or persons to be tried, the court shall be appointed by superior authority.

When any superior authority deems it desirable, he may appoint a special court-martial for any part of his command.

[NOTE.—For the authority to appoint special courts-martial in the National Guard not in the service of the United States, see sec. 104, act of June 3, 1916, 39 Stat., 208; Appendix 2, *post*.]

22. Commanding officer as "accuser or prosecutor."—The rules laid down in Section I, paragraph 17, *supra*, for determining when a commander is the accuser or prosecutor apply equally to trials by special

courts-martial. When a superior appoints a court because of such disqualification on the part of a subordinate commanding officer, he will specify in the order the names of the person or persons to be tried, and the court will adjourn *sine die* upon the completion of the last case which it is ordered to try.

23. Rank of appointing authority.—As in the case of general courts-martial, the test of the power to appoint a special court-martial is whether the officer is one of the commanders designated in A. W. 9. Such authority is an incident of his power to command, and is independent of his rank.

24. Commanding officer as member.—When but two officers in addition to the commanding officer are available for detail on a special court-martial, the commanding officer will not detail himself as a member of such court. In such a case, if superior authority desires to appoint a special court-martial for such command, the commanding officer, if otherwise eligible, may be appointed as a member thereof.

SECTION III.

SUMMARY COURTS-MARTIAL.

25. Authorities enumerated.—Summary courts-martial may be appointed by the following authorities (A. W. 10), viz:

(*a*) The commanding officer of a garrison.
(*b*) The commanding officer of a fort.
(*c*) The commanding officer of a camp.
(*d*) The commanding officer of any other place not enumerated in (*a*), (*b*), and (*c*) where troops are on duty.
(*e*) The commanding officer of a regiment.
(*f*) The commanding officer of a detached battalion.
(*g*) The commanding officer of a detached company.
(*h*) The commanding officer of any other detachment not enumerated in (*f*) and (*g*).

A summary court-martial may *in any case* be appointed by superior authority when by the latter deemed desirable.

[NOTE.—For the authority to appoint summary courts-martial in the National Guard not in the service of the United States, see sec. 105, act of June 3, 1916, 39 Stat., 208; Appendix 2, *post.*]

26. When more than one officer present.—When more than one officer is present the summary court-martial will be appointed from staff officers or available line officers junior to the commanding officer. The commanding officer will not in such cases designate himself as the summary court-martial. The senior officer on duty at a recruiting station is a "commanding officer" in the sense of the last preceding sentence when there is another officer present at the same station, even though the latter may be serving at an auxiliary or branch station. (Bul. 46, War Dept., Oct. 24, 1914.)

27. When but one officer present.—When but one officer is present with a command he shall be the summary court-martial of that command and shall hear and determine cases brought before him. (A. W. 10.) In such a case, no order appointing the court will be issued but the officer will enter on the record that he is the "only officer present with the command." (As to retired officers, see par. 9, *b*.)

28. "Detachment" defined.—A battalion or other unit is "detached" when isolated or removed from the immediate disciplinary control of a superior of the same branch of the service in such a manner as to make its commander primarily the one to be looked to by superior authority as the officer responsible for the administration of the discipline of the enlisted men composing the same. The term is used in a disciplinary sense, and is not necessarily limited to what constitutes detachment in a physical or tactical sense. The commanding officers of such units as field signal battalions, aero squadrons, field bakeries, and ammunition, engineer, or sanitary trains, if their respective commands are independent, except in so far as they constitute parts of a division, and if their commanders are responsible directly to the division commander for the maintenance of discipline in those commands, are competent to appoint summary courts for the same, subject to the power of the division commander to appoint summary courts for all subordinate organizations and detachments under his command if by him deemed advisable.

So likewise the various service schools, such as the Mounted Service School at Fort Riley, though they may be located within the immediate limits of higher commands, constitute "detachments" within the meaning of A. W. 10, and the commandants thereof have power to appoint summary courts-martial for the trial of enlisted men connected with such schools, subject to the right of the commanding officer of the garrison or fort to appoint such courts when by him deemed desirable. (Bul. 13, War Dept., 1913, p. 7.)

29. Power of brigade commanders.—A brigade commander is responsible for the instruction, tactical efficiency and preparedness for war service of his brigade. (A. R. 194.) If the brigade is serving at one garrison or post he has, by virtue of his power as such garrison or post commander, authority to retain within himself the appointing power of all summary courts within his command, but if he does not exercise the authority which is vested in him by statute he allows the appointing power, including the power of review, to pass to regimental (and detachment) commanders. (Digest, p. 580, XVI, E, 7.) If the brigade is acting as a tactical unit in the field, he may as superior authority, appoint summary courts-martial for his command whenever he deems it desirable, but such authority will ordinarily be exercised by the regimental commanders.

SECTION IV.

JUDGE ADVOCATE.

30. Power to appoint.—For each general or special court-martial the authority appointing the court shall appoint a judge advocate, and for each general court-martial one or more assistant judge advocates when necessary. (A. W. 11.)

31. Duties of judge advocate and assistant judge advocates.—For discussion of the duties of the judge advocate and his assistants see Chapter VII, Sections II and III.

CHAPTER IV.

COURTS-MARTIAL—JURISDICTION.

SECTION I.

JURISDICTION IN GENERAL.

32. Jurisdiction defined.—The jurisdiction of a court-martial is its power to try and determine cases legally referred to it and, in case of a finding of guilty, to award a punishment for the offense within its prescribed limits. Being courts of special and limited jurisdiction their organization, powers, and mode of procedure must conform to all the statutory provisions relating to their jurisdiction. (For the source and kinds of military jurisdiction and persons subject to military law see Chap. I, Secs. I and III.)

33. Courts-martial not part of Federal judicial system.—While courts-martial have no part of the jurisdiction set apart under the article of the Constitution which relates to the judicial power of the United States they have an equally certain constitutional source. They are established under the constitutional power of Congress to make rules for the government and regulation of the land forces of the United States, and are recognized in the provisions of the fifth amendment expressly exempting "cases arising in the land and naval forces" from the requirement as to presentment and indictment by grand jury. They are tribunals appointed by military orders issued under authority of law. The power to appoint them, as well as the power to act upon their proceedings, is vested by law in certain commanding officers. Their jurisdiction is *entirely criminal.* They have no power to adjudge damage for personal injuries or private wrongs, nor to collect private debts. Their judgments upon subjects within their limited jurisdiction, when duly approved or confirmed, are as legal and valid as those of any other tribunals. No appeal can be taken from them, nor can they be set aside, or reviewed by the courts of the United States, nor of any State, but United States courts may, on writ of habeas corpus, inquire into the legality of detention of a person held by military authority, at any time, either before or during trial or while serving sentence, and will order him discharged if it appears to the satisfaction of the court that any of the statutory requirements conferring jurisdiction have not been fulfilled. Their sentences have in themselves no legal effect until they have received the approval or confirmation of the proper commanding officer. With such approval or confirmation, however, their sentences become operative and are as effective as the sentences of civil courts having criminal jurisdiction, and are entitled to the same legal consideration.

34. Conditions necessary to show jurisdiction.—The jurisdiction of every court-martial, and hence the validity of each of its judgments, is conditioned upon these indispensable requisites:

(*a*) That it was convened by an officer empowered by statute to appoint it.

(*b*) That the persons who sat upon the court were legally competent to do so.

(*c*) That the court thus constituted was invested by the acts of Congress with power to try the person and the offense charged.

(*d*) That its sentence was in accordance with law.

"Persons, then, belonging to the Army and the Navy are not subject to illegal or irresponsible courts-martial, when the law for convening them and directing their proceedings of organization and for trial have been disregarded. In such cases, everything which may be done is void—not voidable, but void; and civil courts have never failed, upon a proper suit, to give a party redress, who has been

injured by a void process or void judgment. * * * When we speak of *proceedings* in a cause, or for the organization of the court and for trials, we do not mean mere irregularity in practice on the trial, or any mistaken rulings in respect to evidence or law, but a disregard of the essentials required by the statute under which the court has been convened to try and to punish an offender for an imputed violation of the law." (Dynes *v.* Hoover, 61 U. S. 81; see also Deming *v.* McClaughry, 113 Fed. Rep., 650; McClaughry *v.* Deming, 186 U. S., 63; Mullan *v.* United States, 140 U. S., 240; Ex parte Tucker, 212 Fed. Rep., 569; and A. W. 37.)

35. Procedure when military and civil jurisdiction concurrent.—Courts-martial have exclusive jurisdiction to try persons subject to military law for all purely military crimes and offenses; they have concurrent jurisdiction with the proper civil courts to try such persons for civil crimes and offenses denounced and punished under A. W. 92, 93, 94, and 96. (For limitation as to the crimes of murder and rape, see A. W. 92.) In accordance with a principle of comity as between the civil and military tribunals in cases of concurrent jurisdiction the jurisdiction which first attaches in a particular case is entitled to proceed to its termination. This is, however, not an inflexible rule and need not govern the action of the military authorities in the case of an accused person demanded by the civil authorities to answer for an offense which is primarily one against the civil community.

When any person subject to military law, except (*a*) one who is held by the military authorities to answer, or (*b*) who is awaiting trial, or (*c*) result of trial, or (*d*) who is undergoing sentence for a crime or offense punishable by the Articles of War, is accused of a crime or offense committed within the geographical limits of the States of the Union and the District of Columbia, and punishable by the laws of the land, the commanding officer is required, *except in time of war*, upon application duly made, to use his utmost endeavor to deliver over such accused person, to the civil authorities or to aid the officers of justice in apprehending and securing him, in order that he may be brought to trial. Any commanding officer who upon such application refuses or willfully neglects, except in time of war, to deliver over such accused person to the civil authorities or to aid the officers of justice in apprehending and securing him shall be dismissed from the service or suffer such other punishment as a court-martial may direct.

When, under the provisions of this article, delivery is made to the civil authorities of an offender *undergoing sentence* of a court-martial, such delivery, if followed by conviction, shall be held to interrupt the execution of the sentence of the court-martial, and the offender shall be returned to military custody, after having

answered to the civil authorities for his offense, for the completion of the said court-martial sentence. (A. W. 74.) When offenses against the peace and good order of civil communities are committed by persons subject to military law, the proper military authorities will be prompt in the preferring of charges and the arraignment of offenders, having due regard for arrangements existing for the purpose of securing between the authorities of the two jurisdictions, civil and military, mutual aid and cooperation in the administration of justice. In such cases, if, after charges are preferred, the officer competent to order trial by the proper court-martial deems it inadvisable to bring the case to trial, he will hold the offender and forward the charges, with his views thereon, to The Adjutant General of the Army.

36. Can not be divested by act of accused.—A court-martial having once duly assumed jurisdiction of a case, can not, by any wrongful act of the accused, be ousted of its authority or discharged from its duty to proceed fully to try and determine according to law and its oath. Thus the fact that, after arraignment and during the trial, the accused has escaped from military custody furnishes no ground for not proceeeding to a finding, and, in the event of conviction, to a sentence, in the case; and the court may and should find and sentence as in any other case. During such absence it is proper for his counsel to continue to represent him in all respects as though present.

37. Not territorial.—Military jurisdiction is not territorial. It extends as to persons legally subject to it to offenses committed by them in any place whatsoever, whether within or beyond the territorial jurisdiction of the United States.

38. When terminated—Rule stated.—The jurisdiction of courts-martial over officers, cadets, and soldiers ordinarily ends when they become separated from the service. The following are, however, *exceptions to this general rule:*

(*a*) If any person, being guilty of any of the offenses of fraud, embezzlement, etc., against the United States, while in the military service of the United States, receives his discharge or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial in the same manner and to the same extent as if he had not received such discharge nor been dismissed. (A. W. 94.)

(*b*) When any officer, dismissed by order of the President, makes, in writing, an application for trial, setting forth, under oath, that he has been wrongfully dismissed, the President shall, as soon as the necessities of the service may permit, convene a court-martial to try such officer on the charges on which he shall have been dismissed, and if a court-martial is not so convened within six months from the date of making of such application for trial, or if such court, being

convened, does not award dismissal or death as the punishment of such officer, the order of dismissal by the President shall be void. (R. S. 1230.)

[NOTE.—In time of peace no officer shall be dismissed except in pursuance of the sentence of a court-martial or in mitigation thereof. (A. W. 118.)]

(*c*) All persons under sentence adjudged by courts-martial remain subject to military law, while under such sentence. (A. W. 2.)

(*d*) Where a soldier obtains his discharge by fraud, the discharge may be canceled and the soldier arrested and returned to military control. He may also be required to serve out his enlistment and may be tried for his fraud. (Digest, p. 457, XVI, A. 3.)

(*e*) An honorable discharge releases from the particular contract and term of enlistment to which it relates, and does not therefore relieve the soldier from the consequences of a desertion committed during a prior enlistment. (Digest, p. 462, XXII, A.) A dishonorable discharge does not relate to any particular contract or term of enlistment; it is a discharge from the military service as a punishment—a complete expulsion from the Army—and covers all unexpired enlistments. A soldier thus dishonorably discharged *can not* be made amenable for a desertion or other military offense committed under a prior enlistment except as provided in A. W. 94. Nor would a subsequent enlistment after such dishonorable discharge operate to revive the amenability of the soldier for such offenses. (Digest, p. 462, XXII, B.)

[NOTE.—For an offense committed *prior* to the expiration of his term of enlistment, a soldier may be held in the service and tried *after* the expiration of his term. So, also, a soldier may be tried for offenses committed while making good time lost through desertion, through absence without leave, through disease or injury, the result of his own misconduct, etc., under A. W. 107.]

SECTION II.

JURISDICTION OF GENERAL COURTS-MARTIAL.

39. Persons and offenses—General courts-martial have power (A. W. 12) to try—

(*a*) Any *person* subject to military law, for

(*b*) Any *crime* or *offense* made punishable by the Articles of War.

[NOTE.—No officer shall be brought to trial before a general court-martial appointed by the Superintendent of the Military Academy. (A. W. 12.)]

In addition they have power to try—

(*c*) Any *person other than* (*a*) *above*, who by the law of war is subject to trial by military tribunals, for

(*d*) Any *crime* or *offense* in violation of the law of war.

40. Limits of punishment—Exception.—Punishment upon conviction is discretionary with a general court-martial, except—

(*a*) When mandatory under the law, or

(*b*) When limited by order of the President under A. W. 45; in addition,

(*c*) The death penalty can be imposed only when specifically authorized.

[NOTE.—The death penalty is mandatory in the case of spies (A. W. 82); dismissal is mandatory for conduct unbecoming an officer and gentleman (A. W. 95); either death or imprisonment for life is mandatory for murder and rape (A. W. 92); punishment is mandatory in part and discretionary in part for false muster (A. W. 56), false returns (A. W. 57), officer drunk on duty in time of war (A. W. 85), and personal interest in the sale of provisions (A. W. 87). For limits of punishment fixed by the President under A. W. 45, See Chapter XIII, *post*, Punishments.]

SECTION III.

JURISDICTION OF SPECIAL COURTS-MARTIAL.

41. Persons and offenses.—Special courts-martial shall have power (A. W. 13) to try—

(1) Any *person* subject to military law, *except*—

(*a*) An officer;

(*b*) Any person subject to military law belonging to a class or classes excepted by the President, for

(2) Any *crime or offense* (not capital) made punishable by the Articles of War.

[NOTE.—Cadets and soldiers holding a certificate of eligibility for promotion are excepted from the jurisdiction of Special Courts-martial.]

The following are capital crimes and offenses under the Articles of War, viz.:

(1) *At all times.*—(*a*) Assaulting or disobeying a superior officer (A. W. 64); (*b*) mutiny or sedition (A. W. 66); (*c*) failure to suppress mutiny or sedition (A. W. 67).

(2) *War offenses.*—(*a*) Desertion (A. W. 58); (*b*) advising or aiding another to desert (A. W. 59); (*c*) misbehavior before the enemy (A. W. 75); (*d*) subordinates compelling commander to surrender (A. W. 76); (*e*) improper use of countersign (A. W. 77); (*f*) forcing a safeguard (A. W. 78); (*g*) relieving, corresponding with, or aiding the enemy (A. W. 81); (*h*) spies (A. W. 82); (*i*) misbehavior of sentinel (A. W. 86). (*C. M. C. M., No. 1.*)

42. Limits of punishment.—A special court-martial shall not have power to adjudge—

(*a*) Dishonorable discharge, nor

(*b*) Confinement in excess of six months, nor

(*c*) Forfeiture of more than six months' pay.

[NOTE.—(*a*) Reduction to the ranks in the case of noncommissioned officers and (*b*) reduction in classification in the cases of first-class privates are within the limits of the punishing power of special courts-martial. (Act of Mar. 2, 1913, 37 Stat., 722.)]

SECTION IV.

JURISDICTION OF SUMMARY COURTS-MARTIAL.

43. Persons and offenses.—Summary courts-martial shall have power (A. W. 14) to try—

(1) Any *person* subject to military law, *except*—

(*a*) An officer;

(*b*) A cadet;

(*c*) A soldier holding the privilege of a certificate of eligibility to promotion;

(*d*) A noncommissioned officer who objects thereto (without the authority of the officer competent to bring him to trial before a general court-martial);

(*e*) Any person belonging to a class or classes excepted from the jurisdiction of summary courts-martial by the President.

(2) Any *crime or offense* (not capital) made punishable by the Articles of War.

[NOTE.—For list of capital crimes under the Articles of War see Sec. III, par. 41, *supra*.]

44. Limits of punishment.—A summary court-martial shall not have power to adjudge—

(*a*) Dishonorable discharge,

(*b*) Confinement in excess of three months, nor

(*c*) Forfeiture of more than three months' pay.

Exception.—When the summary court officer is also the commanding officer, no sentence of such summary court-martial adjudging confinement at hard labor or forfeiture of pay, or both, for a period in excess of one month shall be carried into execution until the same shall have been approved by superior authority. (A. W. 14.)

[NOTE.—(*a*) Reduction to the ranks in the case of noncommissioned officers and (*b*) reduction in classification in the cases of first-class privates are within the limits of the punishing power of summary courts-martial. (Act of Mar. 2, 1913, 37 Stat., 723.)]

SECTION V.

JURISDICTION OF OTHER MILITARY TRIBUNALS.

45. When concurrent with courts-martial.—The provisions of the Articles of War conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect to offenders or offenses that by the law of war may be lawfully triable by such military commissions, provost courts, or other military tribunals. (A. W. 15.)

CHAPTER V.

COURTS-MARTIAL—PROCEDURE PRIOR TO TRIAL.

SECTION I.

ARREST AND CONFINEMENT.

46. Arrest or confinement of accused persons.—(*a*) *An officer* charged with crime or with a serious offense under the articles of war shall be placed in arrest by the commanding officer, and in exceptional cases an officer so charged may be placed in confinement by the same authority.

(*b*) *A soldier* charged with crime or with a serious offense under the articles of war shall be placed in confinement, and when charged with a minor offense he may be placed in arrest.

(*c*) *Any other person* subject to military law charged with crime or with a serious offense under the articles of war shall be placed in confinement or in arrest, as circumstances may require; and when charged with a minor offense such person may be placed in arrest. Any person placed in arrest under the provisions of this article

(A. W. 69) shall thereby be restricted to his barracks, quarters, or tent, unless such limits shall be enlarged by proper authority. Any officer who breaks his arrest or who escapes from confinement before he is set at liberty by proper authority shall be dismissed from the service or suffer such other punishment as a court-martial may direct; and any other person subject to military law who escapes from confinement or who breaks his arrest before he is set at liberty by proper authority shall be punished as a court-martial may direct. (A. W. 69.)

[NOTE.—A failure to place a person subject to military law in arrest or confinement or the disregard of any custom or formality connected therewith does not affect the jurisdiction of a court.]

47. Who may order arrests.—(*a*) Only commanding officers have power to place officers in arrest, except as provided in A. W. 68.

[NOTE.—The "commanding officer" thus authorized is the commander of the regiment, separate company, detachment, post, department, etc., in which the officer is serving. Digest, p. 481 I D. 1.]

(*b*) A judge advocate of a court-martial has no authority to place in arrest an officer or soldier about to be tried by the court, or to compel the attendance of the accused before the court by requiring a noncommissioned officer to bring him, or otherwise. These are duties which devolve upon the convening authority or upon the post commander or other proper officer in whose custody or command the accused is at the time. (Digest, p. 498, IV, B, 5.)

(*c*) A court-martial has no control over the nature of the arrest or other status of restraint of a prisoner except as regards his personal freedom in its presence. It cannot place an accused person in arrest or confinement nor can the court, even with a view to facilitate his defense, interfere to cause a close arrest to be enlarged. The officer in command is alone responsible for the prisoners in his charge. (Davis, p. 62.)

48. Arrest, how executed.—An officer is placed in arrest by his commanding officer in person or through another officer, by a verbal or written order or communication, advising him that he is placed in arrest, or will consider himself in arrest, or words to that effect.

49. Status of officer in arrest.—An officer in arrest can not exercise command of any kind. He will not wear a sword nor visit officially his commanding or other superior office unless directed to do so. His applications and requests of every nature will be made in writing. (A. R. 926.)

50. Arrest of officer without preferring charges.—Officers will not be placed in arrest for light offenses. For these the censure of the commanding officer will generally answer the purpose of discipline. Whenever a commanding officer places an officer in arrest without preferring charges, he will make a written report of his action to the brigade or Coast Artillery district commander, stating the cause. The brigade or Coast Artillery district commander, if he thinks the

occasion requires, will call on the officer arrested for any explanation he may desire to make, and take such other action within his authority as he may think necessary, forwarding the papers, with his recommendation, to the department commander, who will, in case a trial is not deemed advisable, forward the papers to The Adjutant General of the Army for file with the officer's record, or for further action. In the case of officers belonging to organizations not attached or belonging to a brigade or Coast Artillery district, the report will be sent directly to the officer exercising general court-martial jurisdiction. (A. R. 924.)

51. Arrest of medical officer.—In ordinary cases where inconvenience to the service would result from it, a medical officer will not be placed in arrest until the court-martial for his trial convenes. (A. R. 925.)

52. Arrest and confinement of soldiers.—Except as provided in A. W. 68, or when restraint is necessary, no soldier will be confined without the order of an officer, who shall previously inquire into his offense (A. R. 930); it is proper, however, for a company commander to delegate to noncommissioned officers of his company the power to place enlisted men in arrest as a means of restraint at the instant when restraint is necessary, but such action must be reported to the company commander at once. (Digest, p. 481, I, E, 1.)

53. Status of noncommissioned officer in arrest.—Noncommissioned officers will not be confined in company with privates if it can be avoided. When placed in arrest, they will not be required to perform any duty in which they may be called upon to exercise authority or control over others, and when placed in confinement, they will not be sent out to work.

54. Abuse of authority to arrest.—The fact that cases of officers put in arrest "at remote military posts or stations" are excepted from the application of A. W. 70 does not authorize an abuse of the power of arrest in these cases. And where, in such a case, an arrest, considering the facilities of communication with the department headquarters and other circumstances, is in fact unreasonably protracted without trial the officer is entitled to be released from arrest upon a proper application submitted for the purpose. (Digest, p. 152, LXXI, C.) Though an officer, in whose case the provisions of A. W. 70 in regard to service of charges and trial have not been complied with, is *entitled* to be released from arrest, he is not authorized to release himself therefrom. If he be not released in accordance with the article he should apply for his discharge from arrest, through the proper channels, to the authority by whose order the arrest was imposed, or other proper superior. (Digest, p. 153, LXXI, D.) When an officer is placed in arrest in the operation of A. W. 69 and subsequently tried he is not entitled to be released from

arrest, as a right, until the proper reviewing authority has acted on the record of his case. (Digest, p. 152, LXV, C.)

55. Refusal to receive and keep prisoners.—No provost marshal or commander of a guard shall refuse to receive or keep any prisoner committed to his charge by an officer belonging to the forces of the United States, provided the officer committing shall, at the time, deliver an account in writing, signed by himself, of the crime or offense charged against the prisoner. Any officer or soldier so refusing shall be punished as a court-martial may direct. (A. W. 71.)

[NOTE.—A. W. 72 requires every commander of a guard to submit a report in writing to his commanding officer within twenty-four hours after the confinement of a prisoner (or as soon as he is relieved from his guard) showing (*a*) the name of such prisoner, (*b*) the offense charged against him, and (*c*) the name of the officer committing him. Such report is ordinarily contained in the "Guard report" and presented to the commanding officer by the old officer of the day at guard mounting. For duty of commanding officers to surrender prisoners to civil authorities, see par. 35.]

56. Placing prisoners in irons.—Prisoners will not be placed in irons except in the extraordinary case of a prisoner who, in the judgment of the commanding officer, is a desperate or dangerous character, in which case report of action and the circumstances will be immediately made to the department or tactical division commander. When a prisoner is removed from irons a report of that action will be made to the department or tactical division commander. A prisoner may be shackled or handcuffed while being transported from one post to another, or from a post to a penitentiary, when, in the judgment of the officer in charge, the escape of the prisoner can not otherwise be prevented. (A. R. 935.)

57. Releasing prisoner without proper authority.—Any person subject to military law, who, without proper authority, releases any prisoner duly committed to his charge, or who, through neglect or design, suffers any prisoner so committed to escape, shall be punished as a court-martial may direct. (A. W. 73.)

SECTION II.

ARREST OF DESERTERS BY CIVIL AUTHORITIES.

58. Authority for apprehension.—It shall be lawful for any civil officer having authority under the laws of the United States, or of any State, Territory, District, or possession of the United States, to arrest offenders, summarily to arrest a deserter from the military service of the United States and deliver him into the custody of the military authorities of the United States. (A. W. 106.)

59. Authority of citizens other than peace officers to arrest deserters.—The statute conferring authority upon civil officers to apprehend and deliver deserters (A. W. 106) should not be construed as taking away the authority for their apprehension by a citizen under an

order or direction of a military officer, but the legislation should be treated as providing an *additional* means of securing the arrest of deserters by conferring authority upon civil officers to apprehend them without military orders—leaving the former method still legal. The offer of reward for the apprehension and delivery of a deserter, coupled with the act of Congress which provides for the payment of such a reward, is considered sufficient authority for the arrest of the deserter by a citizen. (C-17327-A, July 20, 1909.)

60. Minority of deserter.—The right of the United States to arrest and bring to trial a deserter is paramount to any right of control over him by a parent on the ground of his minority. (See Digest, p. 401, III, G; In re Cosenow, 37 Fed. Rep., 668; In re Kaufman, 41 Fed. Rep., 876; and compare In re Grimley, 137 U. S., 147, and in re Morrissey, 137 U. S., 157.)

CHAPTER VI.

COURTS-MARTIAL—PROCEDURE PRIOR TO TRIAL.

[Continued.]

SECTION I.

PREPARATION OF CHARGES.

61. Definitions.—A charge corresponds to a civil indictment. It consists of two parts—the technical "*charge*," which should designate

the alleged crime or offense as a violation of a particular article of war or other statute, and the "*specification*," which sets forth the facts constituting the same. The requisite of a *charge* is that it shall be laid under the proper article of war *or other statute;* of a *specification*, that it shall set forth in simple and concise language facts sufficient to constitute the particular offense and in such manner as to enable a person of common understanding to know what is intended. The general term "charges," in the sense that the word "charge" is used in the first sentence of this paragraph, includes any number of technical charges and their specifications.

[NOTE.—For forms for changes see Appendix 4.]

62. Who may initiate charges.—Military charges, though commonly originating with military persons, may be initiated by civilians. Indeed, it is but performing a public duty for a civilian who becomes cognizant of a serious offense committed by an officer or a soldier to bring it to the attention of the proper commander. A charge may likewise originate with an enlisted man. But by the usage of the service all military charges should be formally preferred by—that is, authenticated by the signature of—a *commissioned* officer. Charges proceeding from a person outside the Army and based upon testimony not in the possession or knowledge of the military authorities, should, in general, be required to be sustained by affidavits or other reliable, evidence, as a condition to their being adopted. (Digest, p. 482, II, B.)

63. Who may prefer charges.—Any officer may prefer charges. An officer is not disqualified from preferring charges by the fact that he is himself under charges or in arrest. (Digest, p. 483, II, C.)

64. Signing charges.—The officer preferring charges will sign his name following the last specification, adding his rank and organization in the Army.

The signing of charges, like orders, with the name of an officer, adding "by order of" his commander, is unusual and not to be recommended. (Digest, p. 487, II, D, 12, a.) The signature of the officer preferring charges forms no part of the charges themselves, but *such signature will nevertheless be copied into the record of trial* by a general or special court-martial, in order that it may affirmatively appear whether the officer preferring the charges (who is *prima facie* the accuser) sat as a member of the court. (See A. W. 8, 9.)

65. Accumulation of charges.—It may sometimes be expedient, where the offenses are slight in themselves and it is deemed desirable to exhibit a continued course of conduct, to wait, before preferring charges, till a series of similar acts have been committed, provided

the period be not unreasonably prolonged; but, in general, charges should be preferred and brought to trial immediately or presently upon the commission of the offenses. Anything like an accumulation or saving up of charges, through a hostile *animus* on the part of the accuser, is discountenanced by the sentiment of the service. (Digest, p. 490, II, F, 2.)

66. Duplication of charges.—The duplication of charges for the same act or mission will be avoided except when, by reason of lack of definite information as to available evidence, it may be necessary to charge the same act or omission as constituting two or more distinct offenses. When the same act or omission in its different aspects is charged as constituting two or more offenses, the court, even though it arrives at a finding of guilty in respect of two or more specifications, should impose punishment only with reference to the act or omission in its most important aspect, and if this rule be not observed by the court the reviewing authority should take the necessary action. Thus a soldier should not be punished for disorderly conduct and for assault, when the disorderly conduct consisted in making the assault. And so, a person subject to military law should not be charged under A. W. 61 for failure to report for a *routine* duty at a time included in a period for which he is charged with absence without leave under the same article; otherwise, when the duty is not a *routine* duty. *Routine* duties are those that are regularly scheduled, such as reveille, retreat, stables, fatigue, schools, drills, and parades, but do not include practice marches or other previously specially appointed and important exercises, of which the accused is chargeable with notice.

67. Consolidation of charges.—Ordinarily all the charges against the accused should be consolidated into one set of charges, and one trial had upon the consolidated set instead of having two or more trials, one upon each set. To avoid taking up unnecessarily the time of a court with minor offenses, where charges are preferred for serious offenses, there should not be joined with them charges for minor derelictions, *unless the latter serve to explain the circumstances surrounding the serious charges*. For instance charges for desertion should not ordinarily be joined with charges for losing through neglect Government property of small value; nor should charges for willful disobedience of the orders of a commissioned officer ordinarily be joined with charges for an absence from a routine duty.

68. Refusal to submit to medical treatment.—An officer or soldier may be charged for refusing to submit to a surgical operation or medical treatment at the hands of the military authorities if it is designed to restore or increase his fitness for service, and is without risk of life.

A soldier who refuses to submit to a surgical operation that the attending surgeon certifies is without risk to his life and is necessary for the removal of a disability that prevents the full performance of any or all military duties that properly can be required of him will, for such refusal, be brought to trial by general court-martial; but if in any such case the attending surgeon is in doubt as to whether the proposed operation involves risk to life, the soldier will not be brought to trial but will be discharged on surgeon's certificate of disability. (G. O. 43, War Dept., 1906.)

69. Joint charges.—Where two or more persons jointly and in pu suance of a common intent commit a crime or offense which can be committed by a combination of persons acting in concert, they may be separately charged and tried for such crime or offense or may be jointly charged and jointly tried. The actual presence of all of the accused persons at the actual commission of the offense is not necessary, for all who take part in the enterprise are equally guilty, though they may be absent from the place of actual commission of the offense with which they are charged. The fact that justice may require that different degrees of punishment be awarded to the different parties constitutes no objection to such a joint prosecution. The mere fact of their committing the same offense together and at the same time, although material as going to show concert, does not necessarily establish it. Thus the fact that several soldiers have absented themselves together without leave will not, in the absence of evidence indicating a concert of action, justify their being arraigned together on a joint charge, for they may merely have been availing themselves of the same convenient opportunity of leaving. Nor is desertion, unless in execution of a conspiracy, chargeable as a joint offense. (Digest, p. 484, II, D, 7.) In joint charges the form of the *charge* does not differ from that in other charges. The form of specification will read as follows:

In that Private ———, Company ———, ——— Infantry; Private ———, Company ———, ——— Infantry; and Private ———, Company ———, ——— Infantry, acting jointly, and in pursuance of a common intent, did [here allege the offense in the language prescribed where the offense is committed by only one person].

The right of challenge may, of course, be exercised by each of the accused. (*C. M. C. M., No. 1.*)

70. Charges not to be preferred upon uncorroborated confession.—Charges should not be preferred for an offense unless there is some evidence other than the confession of the accused that the offense has been committed. This applies particularly in cases of fraudulent.

enlistment. The mere confession by the accused that he had prior service, or was under a certain disability at the time he enlisted, and concealed that fact should not be made the basis for charges unless there is something confirming the confession. Charges should not be preferred in such cases until corroborating evidence that the offense was committed has been secured, or that, the existence of such evidence being ascertained, the necessary steps to obtain it have been taken. (See par. 225.)

71. Charges for private indebtedness.—The military authorities will not attempt to discipline officers and soldiers for failure to pay disputed private indebtedness or claims—that is, indebtedness or a claim where, in the opinion of the military authorities, there is a genuine dispute as to the facts or law—nor will the military authorities attempt to decide such disputed indebtedness or claims. If the indebtedness is disputed the creditor should resort to the civil courts to establish the liability. If, in the opinion of the military authorities, the facts and law are undisputed and there appears to the military authorities to be a private indebtedness, and the officer or soldier does not claim to have a legal or equitable set-off or counterclaim to urge against it, an officer may be brought to trial if his failure is considered to be a violation of A. W. 95 or A. W. 96, and a soldier may be tried if his failure is considered to be a violation of A. W. 96, but no action will be taken by the military authorities to enforce payment. If an officer or soldier by his conduct in incurring the indebtedness or by his attitude toward it or his creditor thereafter reflect discredit upon the service to which he belongs, he should be brought to trial for his misconduct. If the facts and law, in the opinion of the military authorities, are undisputed and there appears to the military authorities to be no indebtedness, the department will take no further action. Where a soldier was largely indebted and failed to pay his indebtedness and the commanding officer denied the soldier all pass privileges until the indebtedness was paid, it was held that such action on the part of the commanding officer constituted an attempt to enforce payment of the indebtedness and was contrary to the policy of the War Department and such action should be revoked. (Digest, p. 878, IV.)

72. Numbering charges and specifications.—Where there are several specifications under one article, the usual procedure is to place them all under one charge, rather than to make several charges with one specification under each. Where there are several specifications under one charge they will be consecutively numbered, and where there are several charges, the charges will be consecutively numbered.

73. Additional charges.—New and separate charges which are preferred after others have been preferred are known in military law as "additional charges." Such charges may relate to past transactions which were not known by or brought to the attention of the officer framing or ordering the original charges at the time they were preferred; or they may, as is more frequent, arise from acts of the accused subsequent to his arrest or confinement on the original charges. Thus, if after charges have been preferred he commits a "breach of arrest," an additional charge will properly be preferred in the case, and should be designated as an "additional" charge. Charges of this character do not require a separate trial, but may and preferably should be tried by the same court that tries the original charges, and at the same time subject to the limitation regarding service of charges contained in A. W. 70. If practicable to consolidate the two sets of charges this should be done, otherwise the second set will be denominated "additional" charges. After the court has been duly sworn to try and determine "the matter now before it" additional charges which the accused has had no notice to defend and regarding which the right to challenge has not been accorded him, can not be introduced or the accused required to plead thereto. Such charges must await a separate trial. (See Winthrop pp. 225, 226.) (*C. M. C. M., No. 1.*)

74. Rules to be observed in pleading.—(*a*) *Statement of charge.*—The charge should be limited to a statement of the article violated, as "Violation of the 58th article of war," or "violation of the 85th article of war." Common law and statutory crimes, not specified in the Articles of War, over which courts-martial have jurisdiction should, if not capital, be charged under A. W. 96.

(*b*) *Statement of specification.*—The specification need not possess the technical nicety of an indictment. In general a bald statement of the facts in simple and concise language, and in such a manner as to enable a person of common understanding to know what is intended is sufficient, provided the offense itself be distinctly and accurately described. More specifically, (1) the name, rank, title, and organization of the accused person, if he belongs to the Army of the United States, should be stated, or if he is a civilian he should be so described that it appears he is a person subject to military law, or by statute or the law of war, is subject to trial by military tribunals; (2) the facts that constitute the offense charged will be set out briefly but clearly, together with the place and time of commission. Care should be taken that all the elements of the offense as denounced in the article of war or other statute are set forth. The specification must be appropriate to the charge. (See Winthrop, p. 189, and authorities there cited.)

(*c*) *Alternative pleading.*—A specification should not allege two offenses in the alternative. For example, an offense under A. W. 84 can not be charged by the words, "did sell *or* through neglect lose." If, as the result of an investigation, there is doubt whether the property has been sold or lost, both offenses may be charged under separate specifications. Care will be taken in every case where an article of war includes two or more offenses to see that each specification alleges but a single offense. (See Digest, p. 487, II, D, 11, d.)

(*d*) *Evidence not to be pleaded.*—It is not good pleading in alleging an offense to state the circumstances or evidence proving or tending to prove it, such as the acts, occurrences, and matters of description, which should properly form part of the testimony of witnesses; but there is no objection to stating very briefly in the specification the immediate result or effect of the act charged as a circumstance of description illustrating the character and extent of the offense committed. For instance, in charging a striking or doing of violence to a superior officer under A. W. 64, it is allowable, in a case where the assault was fatal, to add in the specification, "thereby causing his death," as indicating the measure of violence employed. (Digest, p. 488, II, D, 14, *a*.)

(*e*) *Specific articles, when used.*—When a crime or offense is specifically provided for in an article of war, the charge will be laid under that article and not under the general article, i. e., under A. W. 96. This rule is particularly to be observed when the crime or offense falls under an article which prescribes a fixed punishment. (See, however, A. W. 37.)

[NOTE.—In charging offenses against cadets for violation of regulations of the Military Academy, the offense, if covered by a specific article applicable to cadets, will be laid under that article (G. O. 64, War Dept., 1906), otherwise it will be laid under the general article.]

(*f*) *Forms for charges.*—The forms for charges and specifications set forth in Appendix 4 cover most of the offenses that are tried by military courts and covered in the maximum-punishment order. These forms may be followed, in the cases to which they apply, but they are not mandatory.

(*g*) *Time and place.*—The allegations of the *time* and *place* of the commission of an offense should be stated as accurately as possible, but where the act or acts charged extend over a considerable period of time it may be necessary to cover such period in the allegation. Thus allegations of "from March to September, 1887," and "from May to October, 1888," have been countenanced in a case in which the accused was charged with the neglect of a duty that required continuous performance. (Digest, p. 486, II, D, 10, *b*.) So, also, it is proper to allege that an offense was committed while "en route" between certain points. (Digest, p. 486, II, D, 9, *b*.) So where the exact time or place of the commission of the offense is not known it

is frequently preferable to allege it as having occurred "on or about" a certain date or time, or "at or near" a certain locality, rather than to aver it as committed on a particular day or between two specified days or at a particular place. There is no defined construction to be placed upon the words "on or about" as used in the allegation of time in a specification. The phrase can not be said to cover any precise number of days or latitude in time. It is ordinarily used in military pleading for the purpose of indicating some period, as nearly as can be ascertained and set forth, at or during which the offenses charged are believed to have been committed—in cases where the exact day can not well be named. And the same is to be said as to the use of the words "at or near" in connection with the averment of place. (Digest, p. 485, II, D, 9, *a*.) If the specification alleges the offense to have been committed "on" a certain date or "at" a certain place, the court in its findings may, by exceptions and substitutions, find another date or place if the evidence supports such amendments, provided the new date or place is sufficiently near the one alleged that an injustice is not done the accused. In preparing several specifications under one charge, the time and place of the alleged offense will be given in each specification.

(*h*) *Christian name.*—The Christian name of an accused should be used in preparing charges, but where there are one or more middle names they may be indicated by the initials only. In the case of a person in the military service the name used in the charges should correspond to that borne by the accused on the muster rolls or the Army register.

(*i*) *Charging under "alias."*—If the accused is known by two names, as where a soldier enlists under a name different from that under which he was known in his prior enlistment, both the heading of the charge and the specification will describe him under his true name and also under his assumed name as an *alias*.

(*j*) *General prisoners.*—In charging a general prisoner with an offense, the form of the charge will not be changed but the specification will read as follows:

In that General Prisoner A——— B——— did [here allege the offense in the language prescribed when it is committed by an officer or soldier].

It is not necessary to allege in the specification that the general prisoner was formerly a soldier, was tried by a general court-martial, and sentenced to dishonorable discharge and a term of confinement, and that he committed the offense while serving such confinement. The words "general prisoner" necessarily import such facts.

[NOTE.—General prisoners are persons sentenced to dismissal or dishonorable discharge and to terms of confinement at military posts or elsewhere.]

(*k*) *Change of rank.*—Where the rank of the accused has changed since the commission of an offense, the specification will read as follows:

In that Private A——— B———, Company ———, ——— Infantry, then sergeant, Company ———, ——— Infantry, did, etc.

(*l*) *Written papers and oral statements.*—A specification in alleging the violation of an order which has been given in writing, or of any written obligation—as an oath of allegiance, parole, etc.—should preferably set forth the writing verbatim, or at least state fully its substance, and then clearly specify the act or acts which constitute its alleged violation. Oral statements should be alleged in as nearly the exact words as possible, but should always be qualified by the words "or words to that effect," or some similar expression, since proof will generally vary as to some word or words, particularly if some time has elapsed since the incident. A similar rule obtains in cases involving insubordinate or disrespectful language.

(*m*) *Scandalous and disgraceful offenses.*—In framing charges it is permissible, under the custom of the service, after alleging the facts in the specification, to add, "This to the scandal and disgrace of the military service." This form of charge is appropriate in cases of particularly disgraceful conduct occurring in the presence of a number of persons, particularly civilians, or in uniform, or otherwise resulting in publicity.

(*n*) *Desertion followed by fraudulent enlistment.*—Enlistment by a soldier in desertion is fraudulent. Such soldier should be charged with desertion under A. W. 58, and with fraudulent enlistment under A. W. 54. (Cir. 28, War Dept., 1908.) A fraudulent enlistment is no defense to a charge of desertion but is proof of such desertion, for a soldier can not be excused from repudiating a pending contract by substituting another in its place. In such a case the *status* of desertion remains, notwithstanding the deserter's presence in the military service under a fraudulent enlistment, until he surrenders *as a deserter* or is apprehended as such. For a single desertion followed by a fraudulent enlistment, *but one specification for desertion will be preferred*, in addition to the specification for fraudulent enlistment.

[NOTE.—A. W. 29 constitutes a rule of evidence and is not a punitive article.]

(*o*) *Larceny and sale of public property.*—In cases of larceny of property (not described in A. W. 94) where the accused has sold the stolen property, the charges should not include specifications alleging the sale except where the same has been made to an innocent party and constitutes such a fraud upon the purchaser as to warrant the preferment of a specification based upon such fraud. Proof of

a subsequent sale of stolen property goes to show intent to steal, and, therefore, evidence of such sale should be introduced to support charges of larceny, wherever available. Larceny and sale of United States property in violation of A. W. 94 should each be charged in separate specifications, since that article denounces both offenses.

(*p*) *Wording of statute to be followed.*—Wherever practicable the exact words of the articles of war will be followed. A person under the influence of intoxicating liquor which incapacitates him mentally or physically for the proper performance of duty is "drunk." Therefore, under A. W. 85 the word "drunk" will be used. So in charging other offenses involving drunkenness no other word or phrase will be used as a substitute for "drunk." Under such charges the court should not in its findings substitute such phrases as "under the influence of intoxicating liquor" and "intoxicated" for "drunk."

SECTION II.

ACTION UPON CHARGES.

75. Submission of charges.—All charges for trial by court-martial will be prepared in triplicate, using the prescribed charge sheet as a first sheet and using such additional sheets of ordinary paper as are required. They will be accompanied—

(*a*) Except when trial is to be had by summary court, by a brief statement of the substance of all material testimony expected from each material witness, both those for the prosecution and those for the defense, together with all available and necessary information as to any other actual or probable testimony or evidence in the case; and

(*b*) In the case of a soldier, by properly authenticated evidence of convictions, if any, of an offense or offenses committed by him during his current enlistment and within one year next preceding the date of the alleged commission by him of any offenses set forth in the charges.

They will be forwarded by the officer preferring them to the officer immediately exercising summary court-martial jurisdiction over the command to which the accused belongs, and will by him and by each superior commander into whose hands they may come either be referred to a court-martial within his jurisdiction for trial, forwarded to the next superior authority exercising court-martial jurisdiction over the command to which the accused belongs or pertains, or otherwise disposed of as circumstances may appear to require.

76. Investigation of charges.—If the officer immediately exercising summary court-martial jurisdiction over the command to which the accused belongs or pertains decides to forward the charges to superior authority he will, before so doing, either carefully investigate them

himself or will cause an officer other than the officer preferring the charges to investigate them carefully and to report to him, orally or otherwise, the result of such investigation. The officer investigating the charges will afford to the accused an opportunity to make any statement, offer any evidence, or present any matter in extenuation that he may desire to have considered in connection with the accusation against him. (See par. 225 (*b*), p. 112.) If the accused desires to submit nothing, the indorsement will so state. In his indorsement forwarding the charges to superior authority the commanding officer will include:

(*a*) The name of the officer who investigated the charges;

(*b*) The opinion of both such officer and himself as to whether the several charges can be sustained;

(*c*) The substance of such material statement, if any, as the accused may have voluntarily made in connection with the case during the investigation thereof;

(*d*) A summary of the extenuating circumstances, if any, connected with the case;

(*e*) His recommendation of action to be taken.

77. Prompt action required.—No person put in arrest shall be continued in confinement more than eight days, or until such time as a court-martial can be assembled. When any person is put in arrest for the purpose of trial, except at remote military posts or stations, the officer by whose order he is arrested shall see that a copy of the charges on which he is to be tried is served upon him within eight days after his arrest, and that he is brought to trial within ten days thereafter, unless the necessities of the service prevent such trial; and then he shall be brought to trial within thrity days after the expiration of said ten days. If a copy of the charges be not served, or the arrested person be not brought to trial, as herein required, the arrest shall cease. But persons released from arrest, under the provisions of A. W. 70, may be tried whenever the exigencies of the service shall permit, within twelve months after such release from arrest. (A. W. 70.)

78. Determination of proper trial court.—When an officer who exercises court-martial jurisdiction receives charges against an enlisted man it is his duty to consider whether they shall be tried by general, special, or summary court-martial. He should not withhold charges from trial by special or summary court solely for the reason that the maximum limit of punishment is beyond the jurisdiction of such courts to impose. On the other hand, he should not refer to a special or summary court-martial offenses which by reason of their inherent gravity or of the circumstances surrounding their commission merit greater formality of trial or more condign punishment than is found in the procedure or jurisdiction of such courts. No fixed rule can be laid down and the matter must be de-

cided by the careful consideration of commanders subject to the limitations that while, in a proper case, desertion may be tried before a special court, felonies and crimes involving moral turpitude should not be, and capital crimes can not be tried by special or summary courts-martial. (A. W. 13, 14. For list of capital crimes and offenses see Chap. IV, Sec. III.)

79. Disposition of copies of charges.—(*a*) When trial is to be had by summary court the charges will be completed as the record of trial, a copy thereof will be completed as a copy of the summary court record for the company or other commander, and the other copy will, with the least practicable delay after action has been taken on the sentence, be completed and transmitted as the required report of trial to the officer exercising general court-martial jurisdiction over the command, there to be filed in the office of the judge advocate for a period of two years, at the end of which time it may be destroyed.

(*b*) When trial is to be had by special or general court-martial the charges and one copy thereof will be referred to the trial judge advocate, the copy to be furnished by him to the accused or his counsel, and the other copy will be used for record purposes in the office of the officer appointing the trial court, the top fold of this copy of the charge sheet, in case of trial by general court-martial, being detached at the proper time and forwarded with the record of trial to the Judge Advocate General of the Army.

80. Service of charges upon accused.—In order that the accused may have sufficient time to prepare for his defense it is provided by A. W. 70 that in time of peace no person shall, against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him.

CHAPTER VII.

COURTS-MARTIAL—ORGANIZATION.

SECTION I.

THE MEMBERS.

81. Place of meeting—Duties of members.—The authority appointing a general or special court-martial designates the place for holding the court, hour of meeting, the members of the court, and the judge advocate. A general or special court-martial assembles at its first session in accordance with the order convening it; thereafter, according to adjournment. Courts will be assembled at posts or stations where trial will be attended with the least expense. A member stationed at the place where the court sits is liable to duty with his command during adjournment from day to day. Subject to any instructions that may be given by the authority that appoints the court, the court will determine the hours of holding its sessions.

82. Uniform.—For regulations regarding uniform to be worn by members of courts-martial, the judge advocate, the accused, and witnesses see Regulations for the Uniform of the United States Army. In any case of doubt (as where the court consists of members but recently mustered into the service), the president of the court will designate the uniform in the notice sent to members notifying them of the place and hour of meeting of the first session.

83. Seating of court.—When the court is ready to proceed it is called to order by the president. Members will be seated according to rank, alternately to the right and left of the president. The judge advocate, the accused, and his counsel are seated so as to be most easily seen and heard by all the members of the court. The reporter should be seated near the judge advocate.

84. Roll call.—At the beginning of each session the judge advocate verifies the presence or absence of the members of the court by calling each officer's name or by informally noting his presence or absence. This verification is noted in the record. (See Appendices 6, 7 for record of general and special courts-martial.) When the accused and his counsel appear before the court for the first time the judge advocate will announce their names to the court.

[NOTE.—For number necessary to constitute a quorum of a general or special court-martial and the procedure to be taken when the number is reduced below five, see par. 7.]

85. Absence of member.—A member of a court-martial who knows or has reason to believe, that he will, for a proper reason, be absent from a session of the court, will inform the judge advocate accordingly. When a member of a court-martial is absent from a session thereof, the judge advocate will cause that fact, together with the reason for such absence if known to him, to be shown in the record of proceedings. If the reason for such absence is not known to the judge advocate, he will cause the record to show the member as absent, cause

unknown. In any event, the appointing authority will take such action, if any, relative to such absence as he may deem proper.

86. Decorum to be observed.—Trials before courts-martial will be conducted with the decorum observed in civil courts. The conduct of members should accordingly be dignified and attentive. Reading of newspapers or other evidence of inattention by members of a court-martial during its sessions constitutes a neglect of duty to the prejudice of good order and military discipline. It is the duty of the president of the court to admonish against such inattention, and charges may be preferred against a member who does not heed the admonition. A court-martial has no power to punish its members, but a member is liable to charges and trial for improper conduct as for any other offense against military discipline. Improper words used by a member should be taken down in writing and any disorderly conduct reported to the appointing authority. During the reading of the order appointing the court and the arraignment the judge advocate, the accused, and his counsel will stand; while the court and the judge advocate are being sworn all persons concerned with the trial, including any spectators present, will stand; when the reporter, an interpreter, or a witness is being sworn he and the judge advocate will stand; and when the judge advocate, the accused or his counsel addresses the court, he will rise. (For punishment for contempts, see Chapter X, Sec. I, par. 173.)

87. Control of court over accused.—A court-martial has no control over the nature of the arrest or other status of restraint of a prisoner except as regards his personal freedom in its presence. For the relation between a court-martial and the accused during trial as regards arrest, see Chapter V, Section I.

88. Accused not to be tried in irons.—The accused should not be brought before the court in irons, unless there are good reasons to believe that he will attempt to escape or to conduct himself in a violent manner, but the fact that a prisoner has been tried in irons can not in any case affect the validity of the proceedings.

89. Duties of the president.—A president of the court will not be announced. The officer senior in rank present will act as such. The president does not by virtue of being such exercise command of any kind. He is in no sense the commanding officer of the court, and can not by virtue of being president give an order to a member. As the organ of the court he gives the directions necessary to the regular and proper conduct of the proceedings; but a failure to comply with a direction given by him, while it may constitute a neglect to the prejudice of good order and military discipline, can not properly be charged as a violation of the sixty-fourth article of war. (Digest, p. 508, VI, G, 3.) Neither the court nor the president is authorized to place the judge advocate in arrest. Only the proper commanding

officer can impose an arrest. It is the duty of the commanding officer to secure the attendance of the accused before the court. (Digest, p. 509, VII, C, 2; *id.*, VII, C, 3.) The president is the presiding officer of the court, and as such is the organ of the court to maintain order and conduct its business. In addition, he has the duties and privileges of other members. He has an equal vote with other members in deciding all questions, including challenges, findings, sentence, acquittal, and adjournments. He speaks and acts for the court in every instance where a rule of action has been prescribed by law, regulations, or its own resolution, and has no authority to open or close the court or make a ruling upon the admissibility of evidence, the competency of witnesses, or method of procedure without the acquiescence of the court or by custom of the service. He administers the oath to the judge advocate and authenticates by his signature all acts, orders, and proceedings of the court requiring it. (See Winthrop, p. 249.) It is his duty to take the proper steps to insure prompt trial and disposition of all charges referred for trial and to keep the court advised thereof.

[NOTE.—For duty of the president to explain to the accused the effect of a plea of guilty, see Chap. IX, Sec. II, "Pleas to the general issue."]

90. Voting.—Members of a general or special court-martial, in giving their votes, shall begin with the junior in rank. (A. W. 31.) In all deliberations, including those on challenges, findings, sentence, acquittal, and adjournments, the law secures the absolute equality of the members, the president having no greater rights in such matters than any other member. A tie vote on the *findings* is a vote of "not guilty"; a tie vote on a proposed sentence or on a challenge or any objection or motion is a vote in the negative. The sentence is not adopted and the challenge, objection, or motion is not sustained. When the offense charged includes a minor offense, voting shall first be had upon the major offense.

All convictions and sentences (other than those involving death), whether by general or special court-martial, may be determined by a majority of the members present. (A. W. 43.) Refusal to vote on any question arising during the proceedings constitutes a neglect to the prejudice of good order and military discipline punishable under A. W. 96. (For voting on findings and sentence, see Chap. XII, Sec. II.)

91. Closed sessions.—Members take an oath not to disclose or discover the vote or opinion of any particular member of the court-martial. (See A. W. 19.) In order to avoid disclosing or discovering such vote or opinion the court is closed while voting upon any question. When the court is closed all persons (including the judge advocate) withdraw. In important cases, where delay would ensue due to the number of spectators present, the court itself may withdraw to another room prepared for the purpose for deliberating in closed session. It is not necessary, however, for the court

action would be unanimous and business can properly be transacted without disclosing the vote or opinion of any member. Thus, on a request by the judge advocate or the accused for a short recess, it is proper for the president to announce "without objection, the request will be granted," or words to that effect. Similarly, if the accused objects to a member because he preferred the charges and is the accuser and the member admits the fact, he may be excused without going into closed session. Care will be taken in such cases that no votes are taken in open session. If any member believes the matter should be passed upon in closed session, it is proper for him to move that the court be closed, whereupon the president will announce that the court will be cleared.

92. Sitting with closed doors.—A court-martial is authorized, in its discretion, to sit with doors closed to the public. Except, however, when temporarily closed for deliberation, courts-martial in this country are almost invariably open to the public during a trial. But in a particular case where the offenses charged were of a scandalous nature, it was recommended that the court be directed to sit with doors closed to the public. (Digest, p. 516, IX, C.)

93. Change in membership.—Although it is undesirable to change the membership of a court during a trial it is within the discretion of the appointing officer in a proper case, to relieve members or appoint new members. The promotion of a member during the trial of a case does not affect his competency as a member. He should sit according to his changed rank. The rule is that no member who has been absent during the taking of evidence shall thereafter take part in the trial; but the nonobservance of this rule shall not be construed as invalidating the proceedings of courts-martial if no objection is made, and the court permits the member to sit. The rule, however, should be complied with when practicable. Especially should a member who has been absent during an important part of the proceedings not be permitted to resume his seat. Where a member who has been absent is permitted to resume his seat, or a new member is added after the trial of the case has begun, all proceedings and evidence during his absence should be read over to him in open court before the case proceeds further and the record should show this fact; but in proceedings in revision the presence of any member who did not vote on the findings and sentence will invalidate the proceedings in revision.

SECTION II.

THE JUDGE ADVOCATE.

94. Selection.—The prompt, speedy, and thorough trial of a court-martial case is principally dependent upon the judge advocate. He will, accordingly, be carefully selected. Where it can be avoided, no

officer will be detailed as judge advocate of a general court-martial until he has had experience as a member or as an assistant judge advocate of a court.

95. General duties.—The judge advocate of a general or special court-martial shall prosecute in the name of the United States, and shall, under the direction of the court, prepare the record of its proceedings. (A. W. 17.) Before the court assembles the judge advocate will obtain a suitable room for the court, see that it is in order, procure the requisite stationery, summon necessary witnesses, make a preliminary examination of the latter, and, as far as possible, systematize his plans for conducting the case. During the trial he executes all orders of the court; reads the appointing order and any modifying orders to the accused; swears the members of the court, the reporter, interpreter, and all witnesses; arraigns the accused; examines witnesses; keeps or superintends, under the direction of the court, the keeping of a complete and accurate record of the proceedings; and affixes his signature to each day's proceedings. Whenever the court adjourns to meet at the call of the president, the judge advocate will notify the members of the time designated by the president for reassembling. In conjunction with the president of the court, he authenticates the record by his signature and, at the end of the trial, transmits the same to the reviewing authority. In case the record can not be authenticated by the judge advocate by reason of his death, disability, or absence, it shall be signed by the president and an assistant judge advocate, if any; and if there be no assistant judge advocate, or in case of his death, disability, or absence, then by the president and one other member of the court. (A. W. 33.)

96. Duty toward accused.—Should the accused, for any reason, not be represented by counsel, the judge advocate shall, from time to time throughout the proceedings, advise him of his legal rights. (A. W. 17.) He should—

(*a*) Acquaint the prisoner with the accusations against him;

(*b*) Inform him of his right to have counsel;

(*c*) Inform him of his right to testify in his own behalf; and

(*d*) Inform him of his right to have a copy of the charges.

He may ask a prisoner how he intends to plead, but he should in no case try to induce him to plead guilty, or leave him to infer that if he does so his punishment will be lighter. (Winthrop, p. 293.) When the accused determines to plead guilty the judge advocate should advise him of his right to introduce evidence in explanation of his offense, and should assist him in securing it. During the trial he will see that the accused has full opportunity to interpose such pleas and make such defense as may best bring out the facts, the merits, or the extenuating circumstances of his case. In so far as such action may be taken without prejudice to the rights of the accused,

any advice given him by the judge advocate should be given or repeated in open court and noted upon the record.

97. Examination of charges.—The judge advocate will note and report to the convening authority any irregularity in the order convening the court and see that the charges are technically and correctly drawn. He may ordinarily correct obvious mistakes of form, or slight errors in names, dates, amounts, etc., but he will not, without the authority of the convening officer, make *substantial* amendments in the allegations, or—least of all—reject or withdraw a charge or specification or substitute a new and distinct charge for one transmitted to him for trial by the proper superior. (Digest, p. 496, IV, B, 1.) It is the duty of the president as well as the judge advocate of every court-martial to examine carefully the indorsement on the charges when referred for trial in order that an accused may not be brought to trial before the wrong court.

98. Whole truth to be presented.—Throughout the trial the judge advocate should do his utmost to present the whole truth of the matter in question. He should oppose every attempt to suppress facts or to distort them, to the end that the evidence may so exhibit the case that the court may render impartial justice.

99. Legal adviser of the court.—While the court is in open session the judge advocate should respectfully call the attention of the court to any apparent illegalities in its action, and to any apparent irregularities in its proceedings. He should act as legal adviser of the court so far as to give his opinion upon any point of law arising during the trial, when it is asked for by the court, but not otherwise. (See, however, par. 197, p. 96.) When his legal advice or assistance is required it will be obtained in open court. In case the accused desires to plead guilty the judge advocate will, whenever necessary, invite the attention of the president of the court to the fact that the effect of such plea must be explained to him. (See Chap. IX, Sec. II, "Pleas to the general issue.")

100. Freedom in conducting case.—The judge advocate should be left free by the court to introduce his evidence in such order as he sees fit, and in general to bring cases to trial in such order as he deems expedient. (Winthrop, pp. 281–283.) But while it is not the province of the court to direct or control the judge advocate in his prosecution of the case, it is responsible for the thorough investigation of the case, and need not content itself with the evidence brought out by the prosecution and defense. It is proper for the court as a body or for any member to ask questions of a witness if it is believed the examination already submitted has failed fully to develop the case. Usually such questions are not asked until after the prosecution and defense have fully completed their examination of

the witness. The court may direct that the judge advocate recall a witness, secure the attendance of a particular witness, or that he introduce evidence on a particular point. It is the duty of the court to take such action if it believes that thereby the facts in the case will be more clearly presented.

101. Closed sessions.—Whenever a general or special court-martial shall sit in closed session, the judge advocate and the assistant judge advocate, if any, shall withdraw; and when their legal advice or their assistance in referring to the recorded evidence is required, it shall be obtained in open court and in the presence of the accused and of his counsel if there be any. (A. W. 30.) If through mistake or inadvertence the judge advocate should be present during the whole or a part of a closed session of the court, such irregularity is, subject to the provisions of A. W 37, ground for a disapproval of the proceedings by the reviewing authority, but it does not deprive the court of jurisdiction and courts of the United States do not interfere in such a case to release a prisoner by writ of *habeas corpus*. (Ex parte Tucker, 212 Fed. Rep., 569; see also A. W. 37.)

102. Accuser or prosecutor.—The judge advocate is not challengeable; but in case of personal interest in the trial or of personal hostility toward the accused he should apply to the convening authority to be relieved.

103. Expediting trials.—Charges to be tried by a general or special court-martial are referred to the judge advocate of the court. It is his duty to bring them to trial promptly. In most cases tried by court-martial the facts are few and simple, and the witnesses are officers or soldiers stationed at the post where the trial is had. Usually the members of the court, judge advocate, and accused and his counsel are stationed at the same post. In such cases the preliminary investigation, reference for trial, and the trial should take place promptly. If the other official duties of the judge advocate and counsel do not leave time to prepare cases properly and to bring them to trial promptly the president will advise the commanding officer with a view to their being relieved from other duties.

104. Weekly reports.—On Saturday of each week each judge advocate of a general court-martial will report, through the president of the court and the commanding officer, to the appointing authority, a list of charges on hand, showing the date of receipt of each; and if any case has been in the hands of the judge advocate for one week or more and the record of trial has not been forwarded to the convening authority, the report will include a statement of the reasons for the delay. No record need be made of this report by the president of the court or the commanding officer.

105. Detail of orderly.—The commanding officer will detail, when necessary, suitable soldiers as clerks or orderlies to assist the judge

advocate of a general or special court-martial or military commission, or the recorder of a court of inquiry.

SECTION III.

ASSISTANT JUDGE ADVOCATE.

106. Appointment.—The authority appointing a *general* court-martial shall appoint one or more assistant judge advocates when necessary. (A. W. 11.) An assistant judge advocate of a general court-martial shall be competent to perform any duty devolved by law, regulation, or the custom of the service upon the judge advocate of the court. (A. W. 116.)

107. Duties.—An assistant judge advocate will perform such duties in connection with the trial as the judge advocate may designate. Ordinarily he will be expected to relieve the judge advocate of minor details, such as arranging for a place of meeting of the court, stationery, and messenger service, stenographers and interpreters, subpœnaing witnesses, and notifying the court of the place and hour of meeting. During trial he will be expected to see that witnesses are on hand when needed, that all details of procedure are observed and the record accurately kept. He may also be intrusted by the judge advocate with the investigation before trial and proof during trial of any special phase of the charges, or he may, where the judge advocate is otherwise engaged, take charge of the complete trial of a case. (See also A. W. 33.) While the judge advocate and assistant judge advocate will ordinarily be present during trial, if their duties require the presence of either of them elsewhere, he may be excused by the court; but the fact of his withdrawal or absence, the reason therefor, and his return to the court will be noted in the record. (See form for record of a general court-martial, Appendix 6.)

Wherever in this Manual the judge advocate of a *general* court-martial is mentioned, the term will be understood to include assistant judge advocates, if any, unless the context shows clearly that a different sense is intended.

SECTION IV.

COUNSEL.

108. Appointment.—The accused shall have the right to be represented before a general or special court-martial by counsel of his own selection, for his defense, if such counsel be reasonably available. (A. W. 17.) Civilian counsel will not be provided at the expense of the Government. (Digest, p. 506, V, G, 5.) Should the accused request the appointment as his counsel of an officer stationed at the station

where the court sits, and such officer be not a member of the court, the commanding officer will appoint such officer as counsel if he is reasonably available. Should the commanding officer decide that the officer desired by the accused is not reasonably available, the accused may appeal to the officer appointing the court, whose decision shall be final. If the counsel desired by the accused is not under the control of the commanding officer where the trial is held, application for counsel will be submitted by the accused in writing to the appointing authority, whose decision as to whether the officer desired is "reasonably available" is final. Officers of the Judge Advocate General's Department are not available for appointment as counsel for the defense in trials by courts-martial.

109. Duty of officer as counsel.—An officer acting as counsel before a general or special court-martial should perform such duties as usually devolve upon the counsel for a defendant before civil courts in criminal cases. He should guard the interests of the accused by all honorable and legitimate means known to the law, but should not obstruct the proceedings with frivolous and manifestly useless objections or discussions.

110. Right to interview the accused.—An accused, even if in close arrest, will be allowed to have such interviews with his counsel, military or civil, as may be required in order to prepare his defense. Counsel will also be permitted to have interviews with any other person who may be a witness for the accused, or whose knowledge of facts may be useful to the accused in preparing for trial.

111. Witnesses, how questioned during trial.—If the judge advocate personally prepares the record the counsel will be required to reduce his questions and arguments to writing; but if the court has a stenographic reporter, the counsel will be allowed to question witnesses and address the court orally.

SECTION V.

REPORTER.

112. Employment.—Under such regulations as the Secretary of War may from time to time prescribe, the president of a court-martial or military commission, or a court of inquiry, shall have power to appoint a reporter, who shall record the proceedings of and testimony taken before such court or commission and may set down the same, in the first instance, in shorthand. (A. W. 115.) Reporters will be employed only when authorized by the appointing authority. They will not be authorized for special courts-martial, except when the appointing authority directs that the testimony be reduced to writing.

[NOTE.—For form of oath for reporter see par. 135.]

113. Compensation—Decisions.—The reporter shall be paid at the following rates of compensation by the Quartermaster Corps on vouchers certified to be correct by the judge advocate or recorder:

(*a*) For each case not to exceed $1 an hour for time actually spent in court during the trial or hearing, except when the court or commission sits less than three hours during the first day, when the allowance for such day shall be $3. Time will be reckoned to the nearest half of an hour.

(*b*) Fifteen cents for each 100 words for transcribing notes and making that portion of the original record which is typewritten; but no allowance shall be made for the first carbon copy of that portion of the record which is typewritten or for original papers which are appended as exhibits.

(*c*) Ten cents for each 100 words for copying papers material to the inquiry, and 2 cents for each 100 words for each carbon copy of the same, when ordered by the court or commission for its use.

(*d*) Two cents for each 100 words for the second and each additional carbon copy of the record when authorized by the convening authority.

(*e*) Except for such part of the journey as may be covered by Government transportation, mileage at the rate authorized for a civilian witness not in Government employ and $3 a day for expenses when the judge advocate or recorder keeps him, at his own expense, away from his usual place of employment for twenty-four hours or more, on public business referred to the court or commission, shall be allowed the reporter for himself, and, when ordered by the court or commission, for each necessary assistant.

(*f*) When a stenographic reporter is authorized for a special court-martial only one copy of the proceedings will be required, and for transcribing notes and making that part of the record of a trial by special court-martial which is typewritten, the reporter, other than an enlisted man, shall receive 13 cents for each 100 words.

[NOTE.—The following decisions regarding compensation of reporters will be observed in preparing vouchers:

(*a*) The payment to a reporter of $3 for each case completed by him is not authorized when more than one case is disposed of in one day, each case requiring less than three hours in which to be completed, but simply guarantees the reporter at least $3 for each day that the court or commission sits when a new case is taken up for that day. (Cir. 81, War Dept., 1908.)

(*b*) In determining the period for which a reporter is entitled to the allowance of $3 a day for expenses when kept away from his usual place of employment time should be counted from the date on which he is required to leave his usual place of business by the terms of his employment to the date of his return thereto, provided there be no unnecessary delay in the travel to and from the place where the court meets. (Par. 1244, Manual Q. M. Corps, 1916.)

(*c*) The fact that a reporter returns each night to his home does not preclude the view that he was kept away from his place of business for 24 hours. He is not, however, entitled to mileage for such journeys unless the sessions of the court are held on nonconsecutive days. (Op. J. A. G., Sept. 7, 1910.)

(*d*) A reporter serving two separate courts-martial on the same day is entitled to have his allowances (except mileage) computed separately for each court. (Op. J. A. G., Oct. 13, 1910.)

(*e*) A reporter duly employed, but who, after arrival at court, performs no service, owing to adjournment, is entitled to mileage, $3 for constructive service, and also to the additional $3 if kept away from place of business for 24 hours. (Op. J. A. G., Feb. 18, 1911; June 4, 1914.)

(*f*) The abbreviations "Q.," standing for the word question, and "A.," standing for the word answer, and all dates as "25th" and "1914" will each be counted as one word. Punctuation marks will not be counted as a word. It is not necessary for the judge advocate to count the actual number of words on every page to justify him in certifying the account of the reporter. He may ascertain the total number of words by counting the words on a sufficient number of pages to enable him to ascertain a fair average of the number of words on a page and then ascertain the total by multiplying this average by the number of pages. (Op. J. A. G., Oct. 22, 1909; Feb. 8, 1915.)]

114. Disposition of vouchers.—The original voucher for payment of the reporter will be properly completed and certified by the judge advocate and will be sent for payment to the nearest disbursing quartermaster. A carbon copy of the voucher will be forwarded with the record for the information of the appointing authority.

[NOTE.—For form of voucher for payment of reporter, see Appendix 18.]

115. Detail of soldier.—A soldier may be detailed to serve as a stenographic reporter for general courts-martial, courts of inquiry, and military commissions, and while so serving shall receive extra pay at the rate of not exceeding five cents for each one hundred words taken in shorthand and transcribed, such extra pay to be met from the annual appropriation for expenses of courts-martial. (Act of Aug. 25, 1912, 37 Stat., 575.) Such detail will be made only when a reporter is authorized by the appointing authority.

116. Time limit for completing record.—The judge advocate or recorder shall require the reporter to furnish the typewritten record of the proceedings of each session of the court or commission (together with one carbon copy of the same) not later than twenty-four hours after the adjournment of that session. The complete record will be finished, indexed, bound, and ready for authentication not later than forty-eight hours after the completion of its action by the court or commission on the merits of the case or hearing.

117. Carbon copies of the record.—Whenever a record of a trial of general court-martial is to be typewritten by a reporter, the judge advocate will inform the accused of his right to demand a copy of the record, and will require of him a statement as to whether or not he desires a copy. If the answer be in the affirmative, the judge advocate will cause the reporter to prepare a carbon copy; this copy will be turned over to the accused. If the answer be in the negative, no carbon copy will be prepared. In either case, notation of the action taken will be made on the index sheet of the record. (See form for record of general court-martial, Appendix 6.) In case of joint trials, the judge advocate will, in case a stenographer is employed,

have one copy of the record made for each of the accused requesting the same. When records of trial by general court-martial are typewritten, the copyable ribbon will be used. (*C. M. C. M., No. 1.*)

118. Extra compensation for clerical duties.—No person in the military or civil service of the Government can lawfully receive extra compensation for clerical duties performed for a military court except as provided in paragraph 115, *supra.* (A. R. 987.)

SECTION VI.

INTERPRETER.

119. Employment and pay.—Under such regulations as the Secretary of War may from time to time prescribe, the president of a court-martial or military commission, or court of inquiry, or a summary court, may appoint an interpreter, who shall interpret for the court or commission. (A. W 115.) Interpreters may be employed whenever necessary without application to the appointing authority. They will be allowed the pay and allowances of civilian witnesses, which will be paid by the Quartermaster Corps on vouchers certified by the judge advocate or recorder.

[NOTE.—For oath of interpreter see par. 136.]

CHAPTER VIII.

COURTS-MARTIAL—ORGANIZATION.

[Continued.]

SECTION I

CHALLENGES.

120. Occasion for.—The composition of the court-martial having been made known to the accused by the reading of the appointing order, together with any orders which have operated to modify the compo-

sition of the court as originally constituted, he is asked by the judge advocate whether he objects to being tried by any member present named in the order and modifying orders. If his reply be in the negative, the court and judge advocate are sworn; if, on the other hand, the accused has objection to a member, he exercises his right in this respect by challenging, in turn, each member to whom he objects. Members of a general or special court-martial may be challenged by the accused, but only for cause stated to the court. The court shall determine the relevancy and validity thereof, and shall not receive a challenge to more than one member at a time. (A. W. 18.) Neither a summary court officer nor the judge advocate of a general or special court-martial is subject to challenge. (Digest, p. 502, IV, N; Davis, p. 85, n, 3.)

[NOTE.—The various classes of challenges recognized at common law have been practically reduced in courts-martial practice to two, viz, (1) *principal* challenges, or those where the member must be excused upon proof of the ground for challenges as alleged; (2) *for favor*, where the court must decide whether the facts proved constitute cause to excuse the member.]

121. Grounds for challenge—(a) Principal challenges.—In the following cases a member will be excused when challenged upon proof of the fact as alleged:

(1) That he sat as a member of a court of inquiry which investigated the charges.

(2) That he has personally investigated the charges and expressed an opinion thereon, or that he has formed a positive and definite opinion as to the guilt or innocence of the accused.

(3) That he is the accuser.

(4) That he will be a witness for the prosecution.

(5) That (upon a rehearing of the case) he sat as a member on the former trial.

(6) That, in the case of the trial of an officer, the member will be promoted by the dismissal of the accused.

(7) That he is related by blood or marriage to the accused.

(8) That he has a declared enmity against the accused.

(b) Challenges for favor.—Where prejudice, hostility, bias, or intimate personal friendship are alleged it is for the court, after hearing the grounds for challenging stated and the reply, if any, of the challenged member, as well as any other evidence presented, to determine whether the grounds stated and proved or admitted are sufficient in fact to disqualify a challenged member.

122. Challenge of new member.—Where new members join or are added to the court after its organization the order detailing such new members should be read to the accused and he should be given full opportunity to challenge. The record will show affirmatively that the right has been accorded the accused to challenge every member of the court.

123. Challenge by judge advocate.—There is no statutory authority for a challenge by the judge advocate, but under the custom of the service after the accused has fully exercised his right of challenge the judge advocate may also challenge for cause in the same manner as the accused. (Digest, p. 502, IV, O.)

124. Member can not challenge.—There is no authority of law or custom of the service for a member of a court-martial to challenge another member, but where one member has knowledge of the fact that another is the accuser in the case or will be a witness for the prosecution he will bring the fact to the attention of the court in order that proper action may be taken. (See par. 129, below.)

125. Procedure upon challenges.—A positive declaration by a member challenged on the ground of prejudice or interest that he is not prejudiced against the accused nor interested in the case is ordinarily satisfactory to the accused, and, in the absence of material evidence in support of the objection, will justify the court in overruling it. If, however, the statement is unsatisfactory, or the member makes no response, the accused may offer testimony in support of his challenge or may subject the challenged member to an examination under oath as to his competency as a member. In such a case the judge advocate administers the oath to the challenged member. The accused and other witnesses may be cross-examined, witnesses may be introduced in rebuttal by the judge advocate and arguments may be made. The whole proceedings, will, in the case of a general court-martial, appear in the record. During the deliberation of the court the challenged member will withdraw If but four members remain they may pass upon the challenge. (See Chap. II, Sec. II.)

[NOTE.—For form of oath to be administered to a challenged member see par. 137.]

126. Member disqualified but not challenged.—In the absence of a challenge the court of itself can not excuse a member from sitting on the trial of a case, but a member not challenged, who thinks himself disqualified for reasons other than those indicated in paragraph 129, below, may announce in open court his supposed disqualification, in order that he may be challenged; or he may apply to the appoint ing authority to be relieved.

127. Waiver of objection.—The rule is that challenges should be made before the arraignment, and if an objection to the competency of a member was known at that time and not made, it will be considered as waived; but if the cause of a member's incompetency was not known at the time of arraignment or did not arise until later, the court will entertain a challenge based on such cause, at any stage of the proceedings.

128. Liberality required.—Courts should be liberal in passing upon challenges, but they will not entertain an objection that is not spe-

cific, and they should be reluctant to sustain one upon the mere assertion of the accused, except where it is admitted by the challenged member.

129. Member as accuser or witness for the prosecution.—No officer shall be eligible to sit as a member of a general or special court-martial when he is the accuser or a witness for the prosecution. (A. W. 8, 9.) After the accused is brought before the court, preferably before the court is sworn, any member thereof who is or believes himself to be the accuser in the case will formally announce that fact to the court, whereupon he will be excused. When the accused, his counsel, the judge advocate, or any member of the court, at any time before the finding, shall have reason to believe that any member thereof is the accuser in the case, or may be called as a witness for the prosecution, such belief shall be communicated to the court, and, if the court, after hearing the facts, find that such member is the accuser or is to be called as a witness for the prosecution, he shall be excused. If at any stage of the proceedings prior to the findings any member of the court be called as a witness for the prosecution, he shall, before qualifying as a witness, be excused from further duty as a member.

130. Member signing charges—When accuser.—Whether or not an officer is the accuser in a particular case is a question of fact. If, notwithstanding his ineligibility, he does sit as a member of a general or special court-martial, the proceedings are necessarily invalid. (A. W. 8, 9; Op. J. A. G., Oct. 11, 1913; id., Nov. 13, 1913, Bull. 38, War Dept., 1913, p. 6.) An officer may be ordered by superior authority to prefer and sign a charge. The action of the officer preferring and signing the charge may be purely ministerial and represent no conviction whatever on his part that an offense has been committed, or that if an offense has been committed it was committed by the person charged. In such a case the accuser is not, in fact, the officer signing the charge, but the officer who directs the preparation and signing of the charge. The former is, therefore, not within the prohibition of the statute. The officer who has signed the charge in a particular case is, however, *prima facie*, the accuser in that case, and therefore ineligible to sit as a member of the trial court. (Op. J. A. G., Feb. 20, 1914, Bull. 8, War Dept., 1914, p. 6.) If in such a case the court should decide that he is eligible, all the evidence upon which the court reached its decision will, in the case of a *general* court-martial, be made of record, and in the case of a *special* court-martial the record will show that evidence touching the eligibility of the officer was heard by the court and the finding arrived at thereon.

131. Member of court as witness.—(*a*) *For the prosecution.*—No officer shall be eligible to sit as a member of a general or a special court-martial who is a witness for the prosecution. (A. W. 8, 9;

Bull. 38, War Dept., 1913, p. 6.) In any case where the proceedings of a court are invalidated by reason of the failure to excuse a member who is the accuser or a witness for the prosecution a new trial may be ordered. (Bull. 8, War Dept., 1914, p. 8.)

(*b*) *For the defense.*—The fact that a member is a witness for the defense will not necessarily disqualify him to sit as a member of the court, and the fact that such a witness sits throughout the trial as a member of the court will not in any way affect the validity of its proceedings.

(*c*) *When called by court.*—Whether a member called as a witness by the court is to be considered as a witness for the prosecution depends on the character of his testimony, which should be carefully considered before a conclusion is reached that he is not. In any case of doubt he should be excused from further participation in the trial as a member. (Op. J. A. G., Nov. 20, 1913.)

(*d*) *When accused pleads guilty.*—When a member is a witness to any charge or specification to which the accused pleads guilty and he is not called as a witness for the prosecution to any other charge or specification, he is not disqualified from sitting as a member. (Op. J. A. G., Nov. 19, 1914, Bull. 52, War Dept., 1914, p. 3.)

SECTION II.

OATHS.

132. Oath of members.—(*a*) The challenges having been disposed of, the judge advocate of a general or special court-martial shall administer to the members of the court, before they proceed upon any trial, the following oath or affirmation (A. W. 19):

You, A. B., do swear (or affirm) that you will well and truly try and determine, according to the evidence, the matter now before you, between the United States of America and the person to be tried, and that you will duly administer justice, without partiality, favor, or affection, according to the provisions of the rules and articles for the government of the Armies of the United States, and if any doubt should arise, not explained by said articles, then according to your consicence, the best of your understanding, and the custom of war in like cases; and you do further swear (or affirm) that you will not divulge the findings or sentence of the court until they shall be published by the proper authority, except to the judge advocate and assistant judge advocate; neither will you disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence thereof as a witness by a court of justice in due course of law. So help you God.

(*b*) In case of affirmation the closing sentence of adjuration will be omitted.

(*c*) When more than one case is tried by the same court, the oath must be administered anew for each case.

(*d*) The oaths or affirmations prescribed in A. W. 19 for the members, the judge advocate, a witness, and others will always be administered, but in addition there may be such additional ceremony or acts as will make the oath or affirmation binding on the conscience of the person taking it.

(*e*) For decorum to be observed during the administration of oaths, see Chapter VII, Section I.

133. Oath of judge advocate.—When the oath or affirmation has been administered to the members of a general or special court-martial, the president of the court shall administer to the judge advocate and to each assistant judge advocate, if any, an oath or affirmation in the following form (A. W. 19):

You, A. B., do swear (or affirm) that you will not divulge the findings or sentence of the court to any but the proper authority until they shall be duly disclosed by the same. So help you God.

134. Oath of witness.—(*a*) All persons who give evidence before a court-martial shall be examined on oath or affirmation in the following form (A. W. 19), administered by the judge advocate:

You swear (or affirm) that the evidence you shall give in the case now in hearing shall be the truth, the whole truth, and nothing but the truth. So help you God.

(*b*) If either the judge advocate or assistant judge advocate is to testify, the oath or affirmation will be administered by the other or by the president.

135. Oath of reporter.—(*a*) Every reporter of the proceedings of a court-martial shall, before entering upon his duties, make oath or affirmation in the following form (A. W. 19), administered by the judge advocate:

You swear (or affirm) that you will faithfully perform the duties of reporter to this court. So help you God.

(*b*) For authority for hiring reporters, and compensation, see Chapter VII, Section V.

136. Oath of interpreter.—Every interpreter in the trial of any case before a court-martial shall, before entering upon his duties, make oath or affirmation in the following form (A. W. 19), administered by the judge advocate:

You swear (or affirm) that you will truly interpret in the case now in hearing. So help you God.

137. Oath to test competency.—When a member of a general or special court-martial is challenged and it is desired to question him regarding his eligibility to sit as a member in the trial of a case, the judge advocate will administer to him the following oath:

You swear that you will true answers make to questions touching your competency as a member of the court in this case. So help you God.

138. Oaths for administrative purposes.—(*a*) Any officer or clerk of any of the departments lawfully detailed to investigate frauds on, or attempts to defraud, the Government, or any irregularity or misconduct of any officer or agent of the United States, and any officer of the Army, Navy, Marine Corps, or Revenue-Cutter Service detailed to conduct an investigation, and the recorder, and if there be none the presiding officer, of any military, naval, or Revenue-Cutter Service board appointed for such purpose, shall have authority to administer an oath to any witness attending to testify or depose in the course of such investigation. (R. S. 183, as amended by the act of Feb. 13, 1911, 36 Stat., 898.)

(*b*) Any judge advocate or acting judge advocate, the president of a general or special court-martial, any summary court-martial, the judge advocate or any assistant judge advocate of a general or special court martial, the president or the recorder of a court of inquiry or of a military board, any officer designated to take a deposition, any officer detailed to conduct an investigation, and the adjutant of any command shall have power to administer oaths for the purposes of the administration of military justice and for other purposes of military administration; and in foreign places where the Army may be serving shall have the general powers of a notary public or of a consul of the United States in the administration of oaths, the execution and acknowledgment of legal instruments, the attestation of documents, and all other forms of notarial acts to be executed by persons subject to military law. (A. W. 114.)

SECTION III.

CONTINUANCES.

139. Authority for.—A court-martial may, for reasonable cause, grant a continuance to either party for such time and as often as may appear to be just. (A. W. 20.) If before the first meeting of the court a continuance is deemed necessary by either party, application therefor should be made to the appointing authority, but if made after assembling the application will be made to the court. When application is made to the court for an extended delay which appears to be well founded, it may be referred to the appointing authority in order that he may determine whether the court should grant it or whether he should dissolve the court.

140. Reason for application to be stated.—The party desiring a continuance must state the reasons upon which his application is based. When it is desired because of the absence of a witness he should distinctly show that the witness is material, that he has used due diligence to procure the testimony or attendance of the witness, and that he has reasonable ground to believe that he will be able to procure

such testimony or attendance within a reasonable time, which time shall be stated.

141. Number of continuances.—The number of continuances which may be granted is not limited, but where extended delays will ensue the court will be justified in exacting proof of due diligence on the part of the party requesting the same, and may even require the reasons to be stated under oath if it has reason to suspect that the intention is merely to delay the proceedings.

SECTION IV.

COMPLETION OF ORGANIZATION.

142. When accomplished.—The court having met, the accused and his counsel having been introduced, the reporter sworn, the convening order read, the right of challenge accorded, and the court and judge advocate sworn, the organization of the court is complete for the trial of the case.

CHAPTER XIII.

COURTS-MARTIAL—PUNISHMENTS.

SECTION I.

DISCIPLINARY POWER OF COMMANDING OFFICER.

333. Authority for.—While courts-martial are the judicial machinery provided by law for the trial of military offenses, the law also recognizes that the legal power of command, when wisely and justly exercised to that end, is a powerful agency for the maintenance of discipline. Courts-martial and the disciplinary powers of commanding officers have their respective fields in which they most effectually function. The tendency, however, is to resort unnecessarily to courts-martial. To invoke court-martial jurisdiction rather than to exercise this power of command in matters to which it is peculiarly applicable and effective, is to choose the wrong instrument, disturb unnecessarily military functions, injure rather than maintain discipline, and fail to exercise an authority the use of which develops and increases the capacity for command.

Legal sanction is now given to the exercise of such disciplinary power by the following article of war:

"ART. 104. Under such regulations as the President may prescribe, and which he may from time to time revoke, alter, or add to, the commanding officer of any detachment, company, or higher command

may, for minor offenses not denied by the accused, impose disciplinary punishments upon persons of his command without the intervention of a court-martial, unless the accused demands trial by court-martial.

The disciplinary punishments authorized by this article may include admonition, reprimand, withholding of privileges, extra fatigue, and restriction to certain specified limits, but shall not include forfeiture of pay or confinement under guard. A person punished under authority of this article who deems his punishment unjust or disproportionate to the offense may, through the proper channel, appeal to the next superior authority, but may in the meantime be required to undergo the punishment adjudged. The commanding officer who imposes the punishment, his successor in command, and superior authority shall have power to mitigate or remit any unexecuted portion of the punishment. The imposition and enforcement of disciplinary punishment under authority of this article for any act or omission shall not be a bar to trial by court-martial for a crime or offense growing out of the same act or omission; but the fact that a disciplinary punishment has been enforced may be shown by the accused upon trial, and when so shown shall be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty."

While commanding officers should always use their utmost influence to prevent breaches of discipline and compose conditions likely to give rise to such breaches, they should also impose and enforce the disciplinary punishment authorized by the above article. This authority, involving the power, judgment, and discretion of the commander, can not be delegated to or in any manner participated in by others, but must be exercised by the commander upon his own judgment and in strict compliance with the article and the regulations prescribed by the President pursuant thereto. Accordingly, the commanding officer of a detachment, company, or higher command will usually dispose of, and may award disciplinary punishment for, any offense committed by any enlisted man of his command which would ordinarily be disposed of by summary court-martial, when the accused does not deny that he committed the offense and does not demand trial by court-martial before the commanding officer has made and announced his decision in the case.

334. Record of punishment.—For each punishment awarded, the commander will cause a brief record to be made showing—

(*a*) Name of accused.

(*b*) Brief statement of offense, including time and place.

(*c*) Statement as to whether or not accused demanded trial by court-martial. To be effective such demand must be made before award of punishment by commanding officer.

(*d*) Disposition of case, with date and punishment awarded, if any.

(*e*) Whether or not appeal was made to higher authority.

(*f*) Decision of higher authority on appeal.

(*g*) Whether or not accused was required to serve punishment pending appeal.

335. Appeals.—If an appeal is made to the next superior authority it shall be in writing through the immediate commander awarding the punishment or his successor, who will immediately forward it to the superior with a copy of the record. An appeal shall consist of a brief statement signed by the accused, giving his reasons for regarding the punishment as unjust or disproportionate, and shall be accompanied by a like brief statement by the commander in support of the punishment awarded. The superior will, in passing upon the appeal, hear no witnesses and will consider no statements other than those forwarded with the appeal, but will be limited strictly to the consideration of the punishment awarded. He will be reluctant to disturb the award of punishment, but when justice clearly requires such action he may modify, set aside, or even increase the punishment awarded, but in no case will he award a different kind of punishment. After having considered the appeal he will return the record to the commanding officer from whom received, with a statement of his disposition of the case.

336. Not limited to soldiers.—The power is not limited in its application, either in law or principle, to enlisted men, but may with propriety be applied as well to commissioned officers, especially those of junior grades. Obviously in the case of officers the occasion for such action will be less frequent, the variety of punishment available more restricted, and the selection of the most effectual punishment more perplexing, but when the best interests of discipline require such action it shall be taken with firmness and in no wise restrained by an unwarranted regard for the commissioned grade of the offender.

If the accused demands a court-martial, steps will promptly be taken to bring him to trial and notation of the demand will appear upon the charges.

SECTION II.

CONFINEMENT IN A PENITENTIARY.

337. When authorized.—The forty-second article of war follows the rules of the Federal Penal Code and practice respecting the imposition of penitentiary confinement in so far as they can be applied to court-martial procedure. Under the Federal Penal Code any offense is a felony which is *punishable* under the code or other statute of the United States by confinement in excess of one year. But

no person may be *confined in a penitentiary* unless the *punishment actually adjudged* for an offense of which he has been convicted exceeds one year. Under civil procedure it is not permissible to join in a single indictment and trial offenses of a different nature. As a matter of practice, also, confinement is never ordered to be executed in a penitentiary unless among the offenses upon which the sentence is awarded is found a felony; that is to say, an offense of a civil nature, separately punishable by confinement to exceed one year. The practical result is that no person is confined in a penitentiary *unless* both of the following conditions subsist:

(1) The confinement that *could lawfully be awarded* as punishment of some one of the offenses of which he stands convicted (if that conviction stood alone) would exceed one year.

(2) The confinement *actually adjudged* exceeds one year.

The ninety-third and ninety-sixth articles of war now confer upon courts-martial jurisdiction to try all crimes and offenses, not capital of which persons subject to military law may be guilty. Under the military practice, dissimilar offenses *may* be joined in the same set of charges; convictions may be had on one set of charges joining crimes of a civil nature with purely military offenses, and a single sentence may be adjudged on all the convictions. Also, there are certain purely military offenses which are by statute made punishable by confinement in a penitentiary, regardless of the term of confinement imposed. Notwithstanding these departures from the practice of Federal courts, the jurisdiction granted to courts-martial to punish offenses of a civil nature ought not to be exercised with greater harshness than is practiced under the criminal jurisdiction of United States courts, and the analogies with the penal rules of those courts ought carefully to be maintained. The forty-second article of war and the following rules of practice which result from that article preserve these analogies as far as they can be preserved under court-martial procedure.

338. Classes of sentences to be executed in a penitentiary.—Sentences of the following classes may be executed in a penitentiary:

Class 1: Commutation of death sentence. Any confinement, whether more or less than a year, awarded by way of commutation of a death sentence, may be executed in a penitentiary; and this is true whether the offense for which the sentence of death was awarded was of a military or of a civil nature, and whether the sentence was awarded on conviction of a capital charge alone or on conviction on a capital charge coupled with conviction on other charges not capital.

Class 2: Military offenses. A sentence of confinement awarded upon conviction of one or more of the military offenses enumerated in this class may be executed in a penitentiary, regardless of the

length of the sentence imposed, but, in practice, a penitentiary should not be designated unless the *confinement adjudged* exceeds one year. However, if a conviction is had on several offenses, either military or civil in nature, one of which is included in this class, and the sentence adjudged on all the convictions together exceeds one year, the confinement may be executed in a penitentiary. The military offenses comprised in this class are:

(*a*) Desertion in time of war.

(*b*) Repeated desertion in time of peace.

(*c*) Mutiny.

Class 3: Offenses of a civil nature. A sentence *exceeding one year's confinement*, awarded, either on conviction of any one or more of the several offenses of a civil nature described below, or on conviction of any one or more of the several offenses of a civil nature described below, coupled with a conviction or convictions of one or more military offenses, may be executed in a penitentiary, *if* any one of the several offenses of a civil nature standing alone would be punishable by confinement exceeding one year by the limits of punishment order, or, if not covered by said order, then by the law denouncing the offense, or by any other Federal statute.

The civil offenses contemplated in class 3 are:

(*a*) An act or omission specified and denounced as an offense in the Penal Code of the United States.

(*b*) An act or omission specified and denounced as an offense in any other statute of the United States. This heading has reference particularly to penal provisions not properly separable from the administrative laws of the several branches and departments of government, and not included in the Penal Code. Such offenses will rarely be encountered in court-martial practice.

(*c*) An act or omission committed or omitted in any place over which the United States has exclusive jurisdiction as provided in the third paragraph of section 272, Penal Code of the United States, where such act is recognized as an offense by the law of the State, Territory, or District in which such place is situate, and when such act is not specifically denounced in the laws of Congress, but is adopted by section 289 of said code. Such offenses, known to local law and not specifically provided for by Federal law, will constitute a small class, infrequently encountered.

(*d*) An act or omission recognized as an offense at the common law as the same exists in the District of Columbia, wherever committed or omitted. The offenses under this head that may be encountered in court-martial practice include the offense of sodomy.

339. Authority for penitentiary sentence to be cited.—In each case tried by general court-martial in which a penitentiary is designated as the place of confinement of the person tried, the record of trial, when for-

warded to the Judge Advocate General of the Army, will be accompanied by a signed statement indicating the law or laws authorizing the confinement in a penitentiary of the person sentenced.

In each case tried by general court-martial in which the confinement of the offender in a penitentiary is authorized by law, but in which a place other than a penitentiary is designated as the place of confinement, the record of trial, when forwarded to the Judge Advocate General of the Army, will be accompanied by a signed statement indicating the law authorizing the confinement in a penitentiary of the person sentenced and the reasons, briefly expressed, for designating a place other than a penitentiary, instead of a penitentiary, as the place of confinement in the particular case.

If the law relied upon as authorizing confinement in a penitentiary be a Federal statute an accurate citation will be regarded as sufficient to indicate the law, but if any other law is relied upon as authorizing such confinement, the law will be quoted in full in the required statement.

SECTION III.

WAR DEPARTMENT POLICY REGARDING PUNISHMENTS.

340. Desertion.—The policy of the War Department respecting punishment for desertion was announced in General Orders, No. 77, War Department, June 10, 1911. Corrective confinement and forfeiture were suggested in cases of inexperienced soldiers who by surrender manifested a disposition to atone for their offenses. The number so punished and saved to the service has so increased each year that this policy has been enforced with fairly satisfactory results. In addition a limited number of this class of offenders has been restored to duty without trial under the provisions of A. R. 131.

Since that order was issued important changes have been introduced in our military penology. Purely military offenders serving sentences in the United States Disciplinary Barracks at Fort Leavenworth and its branches may be restored to an honorable status and complete their enlistment. By the act of August 22, 1912 (37 Stat., 356), reenlistment of this class of offenders is authorized with the approval, in each case, of the Secretary of War. Under the provisions of the act of April 27, 1914 (38 Stat., 354), dishonorable discharge may be suspended with a view to restoration to duty by remission thereof should the conduct of the offender warrant. There are now additional means of saving men to the colors—men whose offenses are thoughtless acts due to youth or inexperience or committed under some special stress, and for these reasons have in them less of the element of culpability. Supplementing these methods is the establish-

ment of disciplinary organizations at the United States Disciplinary Barracks where the offenders of this class who desire reenlistment or restoration may receive an intensive practical training to fit them for efficient service from the moment of rejoining. It is confidently believed that men restored in this way will make better soldiers than those restored by the old methods, viz., without trial under A. R. 131 or with trial and a short period of corrective punishment.

These old methods may be continued in the limited number of cases where there are good grounds for belief that a soldier restored by such methods will creditably complete his enlistment period, but all doubtful cases should be sent before a court competent to adjudge dishonorable discharge and the longer periods of confinement, to the end that advantage may be taken of the more effective methods of reformation and training by hard labor and intensive practical military instruction now provided at the United States Disciplinary Barracks. These periods of confinement are graduated so as to prevent inequalities of punishment for like degrees of culpability and are sufficient, it is believed, to meet the ends of punishment where restoration to duty is not in contemplation. Where restoration is in contemplation, as in case of purely military offenders, including deserters, the period of confinement imposed is, under the new policy, in practical effect the maximum of an indeterminate sentence. In other words, the period for which the offender is held depends entirely upon himself. With good conduct and proper progress toward reform evidencing efficiency in training and fitness to resume service relations the sentence of confinement terminates and the honorable status of duty with the colors is resumed.

While it is the effect of this policy to mitigate the condition of the peace deserter who desires to redeem his record and earn an honorable restoration to duty with the colors, it carries no substantial mitigation as to other classes of deserters. Experience has not thus far demonstrated the wisdom of any change in the policy of severe punishment for this latter class. An engagement for military service has little in common with an ordinary private contract for personal service, and the fact that an individual may abandon such a contract with only minor consequences to himself furnishes no suggestion that a corresponding rule may be properly adopted in the Army. Nor does the fact that the early requirement of the common law that a call to civil office or civil employment under the Government could not be disregarded by the citizen, nor the obligations of such office or employment be laid down at his will, no longer obtains, furnish any such suggestion. An engagement for military service creates a special status, and many obligations flow from that status which are not obligations of the citizen in the civil service of the Government or under a private contract for personal service. Other closely related

considerations inherent in the nature of military service support this view. The Army is an emergent arm of the public service which the Nation holds ready for a time of great peril. Military service is an obligation which every citizen owes the Government. It is settled law that such service may be compelled, if necessary, by draft. Nor is the obligation of the soldier who volunteers for a fixed period different from that of the drafted soldier. By his act of volunteering he consecrates himself to the military service. His engagement, supported by an oath of allegiance, is that the Nation may depend upon him for such service during the fixed period, whatever may be the emergency. When this engagement is breached a high obligation to the Nation is disregarded, a solemn oath of allegiance is violated, and the Government is defrauded in the amount of its outlay incident to inducting the soldier into the military service, training, clothing, and caring for him while he remains in that service, and transporting him to the station from which he deserts. Desertion is thus seen to be, not simply a breach of contract for personal service, but a grave crime against the Government; in time of war perhaps the gravest that a soldier can commit, and at such times punishable with death. These facts furnish ample justification for a continuance of the policy of severe punishment for the offense of desertion in time of peace, subject only to the qualification that it should not be severe to the degree of barring an honorable restoration to duty of the thoughtless, young, or inexperienced offenders who desert and who, on return, manifest a desire to atone for their desertions and qualify themselves in character and training for such restoration by service in the disciplinary battalions and companies now organized at the United States Disciplinary Barracks.

341. Segregation of prisoners.—It is the policy of the War Department to separate, so far as practicable, general prisoners convicted of offenses punishable by penitentiary confinement from general prisoners convicted of purely military offenses or of misdemeanors in connection with purely military offenses. In furtherance of this policy, reviewing authorities will designate a penitentiary as the place of confinement of general prisoners sentenced to be confined for more than one year according to the rules laid down in Section II, *supra*, except in individual cases in which the proved circumstances show that the holding of the prisoners so convicted in barracks associations with misdemeanants and military offenders will not be to the detriment of the latter. Instructions will be issued from time to time by the War Department to commanders having general court-martial jurisdiction regarding the place of confine-

ment for general prisoners sentenced to confinement in penitentiaries. (*C. M. C. M., No. 1.*)

342. Adaptation of punishments.—In cases where the punishment is discretionary the best interests of the service and of society demand thoughtful application of the following principles: That because of the effect of confinement upon the soldier's self-respect confinement is not to be ordered when the interests of the service permit it to be avoided; that a man against whom there is no evidence of previous convictions for the same or similar offenses should be punished less severely than one who has offended repeatedly; that the presence or absence of extenuating or aggravating circumstances should be taken into consideration in determining the measure of punishment in any case; that the maximum limits of punishment authorized are to be applied only in cases in which, from the nature and circumstances of the offense and the general conduct of the offender, severe punishment appears to be necessary to meet the ends of discipline; and that in adjudging punishment the court should take into consideration the individual characteristics of the accused, with a view to determining the nature of the punishment best suited to produce the desired results in the case in question, as the individual factor in one case may be such that punishment of one kind would serve the ends of discipline, while in another case punishment of a different kind would be required. As an instance of the necessity for adapting punishment to the particular case under consideration, it is to be noted that prior experience with detention of pay by sentence of court-martial indicates that this form of punishment, while not generally applicable, was nevertheless found to be an effective means of restraint and discipline for a considerable number of offenders.

343. Relative severity of punishments.—The usual punishments imposed upon soldiers are the following, beginning with the least severe:

(1) Detention of pay,
(2) Forfeiture of pay,
(3) Reduction,
(4) Hard labor without confinement,
(5) Confinement at hard labor, and
(6) Dishonorable discharge.

In the absence of evidence of two or more previous convictions, a minor offense, the nature of which appears to demand punishment by hard labor, should ordinarily be punished by hard labor without confinement, rather than by confinement at hard labor. For offenses properly punishable by detention of pay, forfeiture of pay, reduc-

tion, or hard labor without confinement, those forms of punishment should, as a rule, be resorted to before confinement at hard labor is imposed.

SECTION IV.

PROHIBITED PUNISHMENTS.

344. By statute.—Punishment by flogging, or by branding, marking, or tattooing on the body is prohibited. (A. W. 41.)

345. By custom and regulations.—Many punishments formerly sanctioned have now, under a more enlightened spirit of penology, become so obsolete as to be effectually prohibited by custom without the necessity of regulations; among these, are carrying a loaded knapsack, wearing irons (both handcuffs and leg irons—these are now used only in exceptional cases for the purpose of preventing escape and not as a punishment), shaving the head, placarding, pillory, stocks, and tying up by the thumbs. To impose *military duty in any form as a punishment* must tend to degrade it, to the prejudice of the best interests of the service; such punishments, therefore, as imposing tours of guard duty or requiring a soldier to sound all calls at the post for a certain period, are forbidden. Solitary confinement on a bread and water diet and the placing of a prisoner in irons are regarded as means of enforcing prison discipline. They will not be imposed as a punishment by a court-martial.

SECTION V.

DEATH—COWARDICE—FRAUD.

346. Death penalty.—No person shall, by general court-martial, be convicted of an offense for which the death penalty is made mandatory by law, nor sentenced to suffer death, except by the concurrence of two-thirds of the members of said court-martial and for an offense in these articles expressly made punishable by death. (A. W. 43.) A court-martial, in imposing the sentence of death, should not designate the time and place for its execution, such designation not being within its province, but pertaining to that of the reviewing or confirming authority. If it does so designate, this part of the sentence may be disregarded, and a different time and place be fixed by the reviewing or confirming authority. (Digest, p. 165, XCVI, B.) If the designated day passes without execution, the same authority, or his superior, may name another day. Death by hanging is considered more ignominious than death by shooting and is the usual method of execution designated in the case of spies, of persons guilty of murder in connection with mutiny, or sometimes for desertion in the face of the enemy; but in case of a purely military offense, as sleeping on

post, such sentence when imposed is usually "to be shot to death with musketry." Hanging is the proper method of executing a death sentence when imposed for violation of A. W. 92. For the sake of example and to deter others from committing like offenses the death sentence may, when deemed advisable, be executed in the presence of the troops of the command.

347. Cowardice—Fraud—Accessory penalty.—When an officer is dismissed from the service for cowardice or fraud, the crime, punishment, name, and place of abode of the delinquent shall be published in the newspapers in and about the camp and in the State from which the offender came or where he usually resides; and after such publication it shall be scandalous for an officer to associate with him. (A. W. 44.) The terms "cowardice" and "fraud" as employed in this article refer mainly to the offenses made punishable by A. W. 75 and 94. With these, however, may be regarded as included all offenses in which fraud or cowardice is *necessarily involved*, though the same be not expressed in terms in the charge or specification. (Digest, p. 166, C, A.) The publication throughout the United States in press dispatches of "the crime, punishment, name, and place of abode" of the accused is a sufficient compliance with the article. (See Digest, p. 167, C, B.)

SECTION VI.

MAXIMUM LIMITS.

348. By whom prescribed.—Whenever the punishment for a crime or offense made punishable by these articles is left to the discretion of the court-martial, the punishment shall not, in time of peace, exceed such limit or limits as the President may from time to time prescribe. (A. W. 45.)

APPENDIX 1.

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[1]Old articles 72, 73, 75, 81, 82, and 83 were replaced by the act of Mar. 2, 1913 (37 Stat., 723), effective July 1, 1913.

[NOTE.—Except as otherwise specified herein this code becomes effective on March 1, 1917.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

* * * * * * *

SEC. 3. That section thirteen hundred and forty-two of the Revised Statutes of the United States be, and the same is hereby, amended to read as follows:

"SEC. 1342. The articles included in this section shall be known as the Articles of War and shall at all times and in all places govern the armies of the United States.

"I. PRELIMINARY PROVISIONS.

"ARTICLE 1. DEFINITIONS.—The following words when used in these articles shall be construed in the sense indicated in this Article, unless the context shows that a different sense is intended, namely:

"(a) The word 'officer' shall be construed to refer to a commissioned officer;

"(b) The word 'soldier' shall be construed as including a noncommissioned officer, a private, or any other enlisted man;

"(c) The word 'company' shall be understood as including a troop or battery; and

"(d) The word 'battalion' shall be understood as including a squadron.

"ART. 2. PERSONS SUBJECT TO MILITARY LAW.—The following persons are subject to these articles and shall be understood as included in the term 'any person subject to military law,' or 'persons subject to military law,' whenever used in these articles: *Provided*, That othing contained in this Act, except as specifi-

cally provided in Article two, subparagraph (c), shall be construed to apply to any person under the United States naval jurisdiction, unless otherwise specifically provided by law.

"(a) All officers and soldiers belonging to the Regular Army of the United States; all volunteers, from the dates of their muster or acceptance into the military service of the United States; and all other persons lawfully called, drafted or ordered into, or to duty or for training in, the said service, from the dates they are required by the term of the call, draft or order to obey the same;

"(b) Cadets;

"(c) Officers and soldiers of the Marine Corps when detached for service with the armies of the United States by order of the President: *Provided*, That an officer or soldier of the Marine Corps when so detached may be tried by military court-martial for an offense committed against the laws for the government of the naval service prior to his detachment, and for an offense committed against these articles he may be tried by a naval court-martial after such detachment ceases;

"(d) All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles;

"(e) All persons under sentence adjudged by courts-martial;

"(f) All persons admitted into the Regular Army Soldiers' Home at Washington, District of Columbia.

"II. COURTS-MARTIAL.

"ART. 3. COURTS-MARTIAL CLASSIFIED.—Courts-martial shall be of three kinds, namely;

"First, general courts-martial;

"Second, special courts-martial; and

"Third, summary courts-martial.

"A. COMPOSITION.

"ART. 4. WHO MAY SERVE ON COURTS-MARTIAL.—All officers in the military service of the United States, and officers of the Marine Corps when detached for service with the Army by order of the President, shall be competent to serve on courts-martial for the trial of any persons who may lawfully be brought before such courts for trial.

[NOTE.—This article became effective on August 29, 1916].

"ART. 5. GENERAL COURTS-MARTIAL.—General courts-martial may consist of any number of officers from five to thirteen, inclusive; but they shall not consist of less than thirteen, when that number can be convened without manifest injury to the service.

"ART. 6. SPECIAL COURTS-MARTIAL.—Special courts-martial may consist of any number of officers from three to five, inclusive.

"ART. 7. SUMMARY COURTS-MARTIAL.—A summary court-martial shall consist of one officer.

"B. BY WHOM APPOINTED.

"ART. 8. GENERAL COURTS-MARTIAL.—The President of the United States, the commanding officer of a territorial division or department, the Superintendent of the Military Academy, the commanding officer of an army, an army corps, a

division, or a separate brigade, and, when empowered by the President, the commanding officer of any district or of any force or body of troops may appoint general courts-martial; but when any such commander is the accuser or the prosecutor of the person or persons to be tried, the court shall be appointed by superior competent authority, and no officer shall be eligible to sit as a member of such court when he is the accuser or a witness for the prosecution.

"ART. 9. SPECIAL COURTS-MARTIAL.—The commanding officer of a district, garrison, fort, camp, or other place where troops are on duty, and the commanding officer of a brigade, regiment, detached battalion, or other detached command may appoint special courts-martial; but when any such commanding officer is the accuser or the prosecutor of the person or persons to be tried, the court shall be appointed by superior authority, and may in any case be appointed by superior authority when by the latter deemed desirable; and no officer shall be eligible to sit as a member of such court when he is the accuser or a witness for the prosecution.

"ART. 10. SUMMARY COURTS-MARTIAL.—The commanding officer of a garrison, fort, camp, or other place where troops are on duty, and the commanding officer of a regiment, detached battalion, detached company, or other detachment may appoint summary courts-martial; but such summary courts-martial may in any case be appointed by superior authority when by the latter deemed desirable: *Provided*, That when but one officer is present with a command he shall be the summary court-martial of that command and shall hear and determine cases brought before him.

"ART. 11. APPOINTMENT OF JUDGE ADVOCATES.—For each general or special court-martial the authority appointing the court shall appoint a judge advocate, and for each general court-martial one or more assistant judge advocates when necessary.

"C. JURISDICTION.

"ART. 12. GENERAL COURTS-MARTIAL.—General courts-martial shall have power to try any person subject to military law for any crime or offense made punishable by these articles and any other person who by the law of war is subject to trial by military tribunals: *Provided*, That no officer shall be brought to trial before a general court-martial appointed by the Superintendent of the Military Academy.

"ART. 13. SPECIAL COURTS-MARTIAL.—Special courts-martial shall have power to try any person subject to military law, except an officer, for any crime or offense not capital made punishable by these articles: *Provided*, That the President may, by regulations, which he may modify from time to time, except from the jurisdiction of special courts-martial any class or classes of persons subject to military law.

"Special courts-martial shall not have power to adjudge dishonorable discharge, nor confinement in excess of six months, nor to adjudge forfeiture of more than six months' pay.

[NOTE.—This article became effective on August 29, 1916.]

"ART. 14. SUMMARY COURTS-MARTIAL.—Summary courts-martial shall have power to try any person subject to military law, except an officer, a cadet, or a soldier holding the privileges of a certificate of eligibility to promotion, for any crime or offense not capital made punishable by these articles: *Provided*, That noncommissioned officers shall not, if they object thereto, be brought to trial before a summary court-martial without the authority of the officer competent to bring them to trial before a general court-martial: *Provided further*, That the President may, by regulations, which he may modify from time to time, ex-

cept from the jurisdiction of summary courts-martial any class or classes of persons subject to military law.

"Summary courts-martial shall not have power to adjudge confinement in excess of three months, nor to adjudge the forfeiture of more than three months' pay: *Provided*, That when the summary court officer is also the commanding officer no sentence of such summary court-martial adjudging confinement at hard labor or forfeiture of pay, or both, for a period in excess of one month shall be carried into execution until the same shall have been approved by superior authority.

[NOTE.—This article became effective on August 29, 1916.]

"ART. 15. NOT EXCLUSIVE.—The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by the law of war may be lawfully triable by such military commissions, provost courts, or other military tribunals.

[NOTE.—This article became effective on August 29, 1916.]

"ART. 16. OFFICERS; HOW TRIABLE.—Officers shall be triable only by general courts-martial, and in no case shall an officer, when it can be avoided, be tried by officers inferior to him in rank.

"D. PROCEDURE.

"ART. 17. JUDGE ADVOCATE TO PROSECUTE.—The judge advocate of a general or special court-martial shall prosecute in the name of the United States, and shall, under the direction of the court, prepare the record of its proceedings. The accused shall have the right to be represented before the court by counsel of his own selection for his defense, if such counsel be reasonably available, but should he, for any reason, be unrepresented by counsel, the judge advocate shall from time to time throughout the proceedings advise the accused of his legal rights.

"ART. 18. CHALLENGES.—Members of a general or special court-martial may be challenged by the accused, but only for cause stated to the court. The court shall determine the relevancy and validity thereof, and shall not receive a challenge to more than one member at a time.

"ART. 19. OATHS.—The judge advocate of a general or special court-martial shall administer to the members of the court, before they proceed upon any trial, the following oath or affirmation: 'You, A. B., do swear (or affirm) that you will well and truly try and determine, according to the evidence, the matter now before you, between the United States of America and the person to be tried, and that you will duly administer justice, without partiality, favor, or affection, according to the provisions of the rules and articles for the government of the armies of the United States, and if any doubt should arise, not explained by said articles, then according to your conscience, the best of your understanding, and the custom of war in like cases; and you do further swear (or affirm) that you will not divulge the findings or sentence of the court until they shall be published by the proper authority, except to the judge advocate and assistant judge advocate; neither will you disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence thereof as a witness by a court of justice in due course of law. So help you God.'

"When the oath or affirmation has been administered to the members of a general or special court-martial, the president of the court shall administer to the judge advocate and to each assistant judge advocate, if any, an oath or affirmation in the following form: 'You, A. B., do swear (or affirm) that you

will not divulge the findings or sentence of the court to any but the proper authority until they shall be duly disclosed by the same. So help you God.'

"All persons who give evidence before a court-martial shall be examined on oath or affirmation in the following form: 'You swear (or affirm) that the evidence you shall give in the case now in hearing shall be the truth, the whole truth, and nothing but the truth. So help you God.'

"Every reporter of the proceedings of a court-martial shall, before entering upon his duties, make oath or affirmation in the following form: 'You swear (or affirm) that you will faithfully perform the duties of reporter to this court. So help you God.'

"Every interpreter in the trial of any case before a court-martial shall, before entering upon his duties, make oath or affirmation in the following form: 'You swear (or affirm) that you will truly interpret in the case now in hearing. So help you God.'

"In case of affirmation the closing sentence of adjuration will be omitted.

"ART. 20. CONTINUANCES.—A court-martial may, for reasonable cause, grant a continuance to either party for such time and as often as may appear to be just.

"ART. 21. REFUSAL TO PLEAD.—When the accused, arraigned before a court-martial, from obstinacy and deliberate design stands mute or answers foreign to the purpose, the court may proceed to trial and judgment as if he had pleaded not guilty.

"ART. 22. PROCESS TO OBTAIN WITNESSES.—Every judge advocate of a general or special court-martial and every summary court-martial shall have power to issue the like process to compel witnesses to appear and testify which courts of the United States, having criminal jurisdiction, may lawfully issue; but such process shall run to any part of the United States, its Territories, and possessions.

"ART. 23. REFUSAL TO APPEAR OR TESTIFY.—Every person not subject to military law who, being duly subpœnaed to appear as a witness before any military court, commission, court of inquiry, or board, or before any officer, military or civil, designated to take a deposition to be read in evidence before such court, commission, court of inquiry, or board, willfully neglects or refuses to appear, or refuses to qualify as a witness, or to testify, or produce documentary evidence which such person may have been legally subpœnaed to produce, shall be deemed guilty of a misdemeanor, for which such person shall be punished on information in the district court of the United States or in a court of original criminal jurisdiction in any of the territorial possessions of the United States, jurisdiction being hereby conferred upon such courts for such purpose; and it shall be the duty of the United States district attorney or the officer prosecuting for the Government in any such court of original criminal jurisdiction, on the certification of the facts to him by the military court, commission, court of inquiry, or board, to file an information against and prosecute the person so offending, and the punishment of such person, on conviction, shall be a fine of not more than $500 or imprisonment not to exceed six months, or both, at the discretion of the court: *Provided*, That the fees of such witness and his mileage, at the rates allowed to witnesses attending the courts of the United States, shall be duly paid or tendered said witness, such amounts to be paid out of the appropriation for the compensation of witnesses.

"ART. 24. COMPULSORY SELF-INCRIMINATION PROHIBITED.—No witness before a military court, commission, court of inquiry, or board, or before any officer, military or civil, designated to take a deposition to be read in evidence before a military court, commissions, court of inquiry, or board, shall be compelled to

incriminate himself or to answer any questions which may tend to incriminate or degrade him.

"ART. 25. DEPOSITIONS—WHEN ADMISSIBLE.—A duly authenticated deposition taken upon reasonable notice to the opposite party may be read in evidence before any military court or commission in any case not capital, or in any proceeding before a court of inquiry or a military board, if such deposition be taken when the witness resides, is found, or is about to go beyond the State, Territory, or District in which the court, commission, or board is ordered to sit, or beyond the distance of one hundred miles from the place of trial or hearing, or when it appears to the satisfaction of the court, commission, board, or appointing authority that the witness, by reason of age, sickness, bodily infirmity, imprisonment, or other reasonable cause, is unable to appear and testify in person at the place of trial or hearing: *Provided*, That testimony by deposition may be adduced for the defense in capital cases.

"ART. 26. DEPOSITIONS—BEFORE WHOM TAKEN.—Depositions to be read in evidence before military courts, commissions, courts of inquiry, or military boards, or for other use in military administration, may be taken before and authenticated by any officer, military or civil, authorized by the laws of the United States or by the laws of the place where the deposition is taken to administer oaths.

"ART. 27. COURTS OF INQUIRY.—RECORDS OF, WHEN ADMISSIBLE.—The record of the proceedings of a court of inquiry may be read in evidence before any court-martial or military commission in any case not capital nor extending to the dismissal of an officer, and may also be read in evidence in any proceeding before a court of inquiry or a military board: *Provided*, That such evidence may be adduced by the defense in capital cases or cases extending to the dismissal of an officer.

"ART. 28. RESIGNATION WITHOUT ACCEPTANCE DOES NOT RELEASE OFFICER.—Any officer who, having tendered his resignation and prior to due notice of the acceptance of the same, quits his post or proper duties without leave and with intent to absent himself permanently therefrom shall be deemed a deserter.

"ART. 29. ENLISTMENT WITHOUT DISCHARGE.—Any soldier who, without having first received a regular discharge, again enlists in the Army, or in the militia when in the service of the United States, or in the Navy or Marine Corps of the United States, or in any foreign army, shall be deemed to have deserted the service of the United States; and, where the enlistment is in one of the forces of the United States mentioned above, to have fraudulently enlisted therein.

[NOTE.—This article became effective on August 29, 1916.]

"ART. 30. CLOSED SESSIONS.—Whenever a general or special court-martial shall sit in closed session, the judge advocate and the assistant judge advocate, if any, shall withdraw; and when their legal advice or their assistance in referring to the recorded evidence is required, it shall be obtained in open court and in the presence of the accused and of his counsel if there be any.

"ART. 31. ORDER OF VOTING.—Members of a general or special court-martial, in giving their votes, shall begin with the junior in rank.

"ART. 32. CONTEMPTS.—A court-martial may punish at discretion, subject to the limitations contained in Article fourteen, any person who uses any menacing words, signs, or gestures in its presence, or who disturbs its proceedings by any riot or disorder.

"ART. 33. RECORDS—GENERAL COURTS-MARTIAL.—Each general court-martial shall keep a separate record of its proceedings in the trial of each case brought before it, and such record shall be authenticated by the signature of the president and the judge advocate; but in case the record can not be authenticated

by the judge advocate, by reason of his death, disability, or absence, it shall be signed by the president and an assistant judge advocate, if any; and if there be no assistant judge advocate, or in case of his death, disability, or absence, then by the president and one other member of the court.

"ART. 34. RECORDS—SPECIAL AND SUMMARY COURTS-MARTIAL.—Each special court-martial and each summary court-martial shall keep a record of its proceedings, separate for each case, which record shall contain such matter and be authenticated in such manner as may be required by regulations which the President may from time to time prescribe.

"ART. 35. DISPOSITION OF RECORDS—GENERAL COURTS-MARTIAL.—The judge advocate of each general court-martial shall, with such expedition as circumstances may permit, forward to the appointing authority or to his successor in command the original record of the proceedings of such court in the trial of each case. All records of such proceedings shall, after having been finally acted upon, be transmitted to the Judge Advocate General of the Army.

"ART. 36. DISPOSITION OF RECORDS—SPECIAL AND SUMMARY COURTS-MARTIAL.—After having been acted upon by the officer appointing the court, or by the officer commanding for the time being, the record of each trial by special court-martial and a report of each trial by summary court-martial shall be transmitted to such general headquarters as the President may designate in regulations, there to be filed in the office of the judge advocate. When no longer of use, records of special and summary courts-martial may be destroyed.

"ART. 37. IRREGULARITIES—EFFECT OF.—The proceedings of a court-martial shall not be held invalid, nor the findings or sentence disapproved, in any case on the ground of improper admission or rejection of evidence or for any error as to any matter of pleading or procedure unless in the opinion of the reviewing or confirming authority, after an examination of the entire proceedings, it shall appear that the error complained of has injuriously affected the substantial rights of an accused: *Provided*, That the act or omission upon which the accused has been tried constitutes an offense denounced and made punishable by one or more of these articles: *Provided further*, That the omission of the words 'hard labor' in any sentence of a court-martial adjudging imprisonment or confinement shall not be construed as depriving the authorities executing such sentence of imprisonment or confinement of the power to require hard labor as a part of the punishment in any case where it is authorized by the Executive order prescribing maximum punishments.

"ART. 38. PRESIDENT MAY PRESCRIBE RULES.—The President may by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals: *Provided*, That nothing contrary to or inconsistent with these articles shall be so prescribed: *Provided further*, That all rules made in pursuance of this article shall be laid before the Congress annually.

"E. LIMITATIONS UPON PROSECUTIONS.

"ART. 39. AS TO TIME.—Except for desertion committed in time of war, or for mutiny or murder, no person subject to military law shall be liable to be tried or punished by a court-martial for any crime or offense committed more than two years before the arraignment of such person: *Provided*, That for desertion in time of peace or for any crime or offense punishable under articles ninety-three and ninety-four of this code the period of limitations upon trial and punishment by court-martial shall be three years: *Provided further*, That the period of any absence of the accused from the jurisdiction of the United States,

and also any period during which by reason of some manifest impediment the accused shall not have been amenable to military justice, shall be excluded in computing the aforesaid periods of limitation: *And provided further*, That this article shall not have the effect to authorize the trial or punishment for any crime or offense barred by the provisions of existing law.

"ART. 40. AS TO NUMBER.—No person shall be tried a second time for the same offense.

"F. PUNISHMENTS.

"ART. 41. CERTAIN KINDS PROHIBITED.—Punishment by flogging, or by branding, marking, or tattooing on the body is prohibited.

"ART. 42. PLACES OF CONFINEMENT—WHEN LAWFUL.—Except for desertion in time of war, repeated desertion in time of peace, and mutiny, no person shall under the sentence of a court-martial be punished by confinement in a penitentiary unless an act or omission of which he is convicted is recognized as an offense of a civil nature by some statute of the United States, or at the common law as the same exists in the District of Columbia, or by way of commutation of a death sentence, and unless, also, the period of confinement authorized and adjudged by such court-martial is one year or more: *Provided*, That when a sentence of confinement is adjudged by a court-martial upon conviction of two or more acts or omissions any one of which is punishable under these articles by confinement in a penitentiary the entire sentence of confinement may be executed in a penitentiary: *Provided further*, That penitentiary confinement hereby authorized may be served in any penitentiary directly or indirectly under the jurisdiction of the United States: *Provided further*, That persons sentenced to dishonorable discharge and to confinement not in a penitentiary shall be confined in the United States Disciplinary Barracks or elsewhere as the Secretary of War or the reviewing authority may direct, but not in a penitentiary.

"ART. 43. DEATH SENTENCE—WHEN LAWFUL.—No person shall, by general court-martial, be convicted of an offense for which the death penalty is made mandatory by law, nor sentenced to suffer death, except by the concurrence of two-thirds of the members of said court-martial and for an offense in these articles expressly made punishable by death. All other convictions and sentences, whether by general or special court-martial, may be determined by a majority of the members present.

"ART. 44. COWARDICE; FRAUD—ACCESSORY PENALTY.—When an officer is dismissed from the service for cowardice or fraud, the crime, punishment, name, and place of abode of the delinquent shall be published in the newspapers in and about the camp and in the State from which the offender came or where he usually resides; and after such publication it shall be scandalous for an officer to associate with him.

"ART. 45. MAXIMUM LIMITS.—Whenever the punishment for a crime or offense made punishable by these articles is left to the discretion of the court-martial, the punishment shall not, in time of peace, exceed such limit or limits as the President may from time to time prescribe.

"G. ACTION BY APPOINTING OR SUPERIOR AUTHORITY.

"ART. 46. APPROVAL AND EXECUTION OF SENTENCE.—No sentence of a court-martial shall be carried into execution until the same shall have been approved by the officer appointing the court or by the officer commanding for the time being.

"ART. 47. POWERS INCIDENT TO POWER TO APPROVE.—The power to approve the sentence of a court-martial shall be held to include:

"(a) The power to approve or disapprove a finding and to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense when, in the opinion of the authority having power to approve, the evidence of record requires a finding of only the lesser degree of guilt; and

"(b) The power to approve or disapprove the whole or any part of the sentence.

[NOTE.—This article became effective on August 29, 1916.]

"ART. 48. CONFIRMATION.—WHEN REQUIRED—In addition to the approval required by article forty-six, confirmation by the President is required in the following cases before the sentence of a court-martial is carried into execution, namely:

"(a) Any sentence respecting a general officer;

"(b) Any sentence extending to the dismissal of an officer, except that in time of war a sentence extending to the dismissal of an officer below the grade of brigadier general may be carried into execution upon confirmation by the commanding general of the Army in the field or by the commanding general of the territorial department or division;

"(c) Any sentence extending to the suspension or dismissal of a cadet; and

"(d) Any sentence of death, except in the cases of persons convicted in time of war of murder, rape, mutiny, desertion, or as spies; and in such excepted cases a sentence of death may be carried into execution upon confirmation by the commanding general of the Army in the field or by the commanding general of the territorial department or division.

"When the authority competent to confirm the sentence has already acted as the approving authority no additional confirmation by him is necessary.

"ART. 49. POWERS INCIDENT TO POWER TO CONFIRM.—The power to confirm the sentence of a court-martial shall be held to include:

"(a) The power to confirm or disapprove a finding, and to confirm so much only of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense when, in the opinion of the authority having power to confirm, the evidence of record requires a finding of only the lesser degree of guilt; and

"(b) The power to confirm or disapprove the whole or any part of the sentence.

[NOTE.—This article became effective on August 29, 1916.]

"ART. 50. MITIGATION OR REMISSION OF SENTENCES.—The power to order the execution of the sentence adjudged by a court-martial shall be held to include, *inter alia*, the power to mitigate or remit the whole or any part of the sentence, but no sentence of dismissal of an officer and no sentence of death shall be mitigated or remitted by any authority inferior to the President.

"Any unexecuted portion of a sentence adjudged by a court-martial may be mitigated or remitted by the military authority competent to appoint, for the command, exclusive of penitentiaries and the United States Disciplinary Barracks, in which the person under sentence is held, a court of the kind that imposed the sentence, and the same power may be exercised by superior military authority; but no sentence extending to the dismissal of an officer or loss of files, no sentence of death, and no sentence approved or confirmed by the President shall be remitted or mitigated by any other authority.

"The power of remission and mitigation shall extend to all uncollected forfeitures adjudged by sentence of a court-martial.

"ART. 51. SUSPENSION OF SENTENCES OF DISMISSAL OR DEATH.—The authority competent to order the execution of a sentence of dismissal of an officer or a sentence of death may suspend such sentence until the pleasure of the President be known, and in case of such suspension a copy of the order of suspension, together with a copy of the record of trial, shall immediately be transmitted to the President.

"ART. 52. SUSPENSION OF SENTENCE OF DISHONORABLE DISCHARGE.—The authority competent to order the execution of a sentence, including dishonorable discharge, may suspend the execution of the dishonorable discharge until the soldier's release from confinement; but the order of suspension may be vacated at any time and the execution of the dishonorable discharge directed by the officer having general court-martial jurisdiction over the command, exclusive of penitentiaries and the United States Disciplinary Barracks, in which the soldier is held or by the Secretary of War.

"ART. 53. SUSPENSION OF SENTENCES OF FORFEITURE OR CONFINEMENT.—The authority competent to order the execution of a sentence adjudged by a court-martial may, if the sentence involve neither dismissal nor dishonorable discharge, suspend the execution of the sentence in so far as it relates to the forfeiture of pay or to confinement, or to both; and the person under sentence may be restored to duty during the suspension of confinement. At any time within one year after the date of the order of suspension such order may, for sufficient cause, be vacated and the execution of the sentence directed by the military authority competent to order the execution of like sentences in the command, exclusive of penitentiaries and the United States Disciplinary Barracks, to which the person under sentence belongs or in which he may be found; but if the order of suspension be not vacated within one year after the date thereof the suspended sentence shall be held to have been remitted.

"III. PUNITIVE ARTICLES.

"A. ENLISTMENT; MUSTER; RETURNS.

"ART. 54. FRAUDULENT ENLISTMENT.—Any person who shall procure himself to be enlisted in the military service of the United States by means of willful misrepresentation or concealment as to his qualifications for enlistment, and shall receive pay or allowances under such enlistment, shall be punished as a court-martial may direct.

"ART. 55. OFFICER MAKING UNLAWFUL ENLISTMENT.—Any officer who knowingly enlists or musters into the military service any person whose enlistment or muster in is prohibited by law, regulations, or orders shall be dismissed from the service or suffer such other punishment as a court-martial may direct.

"ART. 56. MUSTER ROLLS—FALSE MUSTER.—At every muster of a regiment, troop, battery, or company the commanding officer thereof shall give to the mustering officer certificates, signed by himself, stating how long absent officers have been absent and the reasons of their absence. And the commanding officer of every troop, battery, or company shall give like certificates, stating how long absent noncommissioned officers and private soldiers have been absent and the reasons of their absence. Such reasons and time of absence shall be inserted in the muster rolls opposite the names of the respective absent officers and soldiers, and the certificates, together with the muster rolls, shall be transmitted by the mustering officer to the Department of War as speedily as the distance of the place and muster will admit. Any officer who knowingly makes a false muster of man or animal, or who signs or directs or allows the signing

of any muster roll knowing the same to contain a false muster or false statement as to the absence or pay of an officer or soldier, or who wrongfully takes money or other consideration on mustering in a regiment, company, or other organization, or on signing muster rolls, or who knowingly musters as an officer or soldier a person who is not such officer or soldier, shall be dismissed from the service and suffer such other punishment as a court-martial may direct.

"ART. 57. FALSE RETURNS—OMISSION TO RENDER RETURNS.—Every officer commanding a regiment, an independent troop, battery, or company, or a garrison, shall, in the beginning of every month, transmit through the proper channels, to the Department of War, an exact return of the same, specifying the names of the officers then absent from their posts, with the reasons for and the time of their absence. Every officer whose duty it is to render to the War Department or other superior authority a return of the state of the troops under his command, or of the arms, ammunitions, clothing, funds, or other property thereunto belonging, who knowingly makes a false return thereof shall be dismissed from the service and suffer such other punishment as a court-martial may direct. And any officer who, through neglect or design, omits to render such return shall be punished as a court-martial may direct.

"B. DESERTION; ABSENCE WITHOUT LEAVE.

"ART. 58. DESERTION.—Any person subject to military law who deserts or attempts to desert the service of the United States shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct, and, if the offense be committed at any other time, any punishment, excepting death, that a court-martial may direct.

"ART. 59. ADVISING OR AIDING ANOTHER TO DESERT.—Any person subject to military law who advises or persuades or knowingly assists another to desert the service of the United States shall, if the offense be committed in time of war, suffer death, or such other punishment as a court-martial may direct, and, if the offense be committed at any other time, any punishment, excepting death, that a court-martial may direct.

"ART. 60. ENTERTAINING A DESERTER.—Any officer who, after having discovered that a soldier in his command is a deserter from the military or naval service or from the Marine Corps, retains such deserter in his command without informing superior authority or the commander of the organization to which the deserter belongs, shall be punished as a court-martial may direct.

"ART. 61. ABSENCE WITHOUT LEAVE.—Any person subject to military law who fails to repair at the fixed time to the properly appointed place of duty, or goes from the same without proper leave, or absents himself from his command, guard, quarters, station, or camp without proper leave, shall be punished as a court-martial may direct.

"C. DISRESPECT; INSUBORDINATION; MUTINY.

"ART. 62. DISRESPECT TOWARD THE PRESIDENT, VICE PRESIDENT, CONGRESS, SECRETARY OF WAR, GOVERNORS, LEGISLATURES.—Any officer who uses contemptuous or disrespectful words against the President, Vice President, the Congress of the United States, the Secretary of War, or the governor or legislature of any State, Territory, or other possession of the United States in which he is quartered shall be dismissed from the service or suffer such other punishment as a court-martial may direct. Any other person subject to military law who so offends shall be punished as a court-martial may direct.

"ART. 63. DISRESPECT TOWARD SUPERIOR OFFICER.—Any person subject to military law who behaves himself with disrespect toward his superior officer shall be punished as a court-martial may direct.

"ART. 64. ASSAULTING OR WILLFULLY DISOBEYING SUPERIOR OFFICER.—Any person subject to military law who, on any pretense whatsoever, strikes his superior officer or draws or lifts up any weapon or offers any violence against him, being in the execution of his office, or willfully disobeys any lawful command of his superior officer, shall suffer death or such other punishment as a court-martial may direct.

"ART. 65. INSUBORDINATE CONDUCT TOWARD NONCOMMISSIONED OFFICER.—Any soldier who strikes or assaults, or who attempts or threatens to strike or assault, or willfully disobeys the lawful order of a noncommissioned officer while in the execution of his office, or uses threatening or insulting language, or behaves in an insubordinate or disrespectful manner toward a noncommissioned officer while in the execution of his office, shall be punished as a court-martial may direct.

"ART. 66. MUTINY OR SEDITION.—Any person subject to military law who attempts to create or who begins, excites, causes, or joins in any mutiny or sedition in any company, party, post, camp, detachment, guard, or other command shall suffer death or such other punishment as a court-martial may direct.

"ART. 67. FAILURE TO SUPPRESS MUTINY OR SEDITION.—Any officer or soldier who, being present at any mutiny or sedition, does not use his utmost endeavor to suppress the same, or knowing or having reason to believe that a mutiny or sedition is to take place, does not without delay give information thereof to his commanding officer shall suffer death or such other punishment as a court-martial may direct.

"ART. 68. QUARRELS; FRAYS; DISORDERS.—All officers and noncommissioned officers have power to part and quell all quarrels, frays, and disorders among persons subject to military law and to order officers who take part in the same into arrest, and other persons subject to military law who take part in the same into arrest or confinement, as circumstances may require, until their proper superior officer is acquainted therewith. And whosoever, being so ordered, refuses to obey such officer or noncommissioned officer or draws a weapon upon or otherwise threatens or does violence to him shall be punished as a court-martial may direct.

"D. ARREST; CONFINEMENT.

"ART. 69. ARREST OR CONFINEMENT OF ACCUSED PERSONS.—An officer charged with crime or with a serious offense under these articles shall be placed in arrest by the commanding officer, and in exceptional cases an officer so charged may be placed in confinement by the same authority. A soldier charged with crime or with a serious offense under these articles shall be placed in confinement, and when charged with a minor offense he may be placed in arrest. Any other person subject to military law charged with crime or with a serious offense under these articles shall be placed in confinement or in arrest, as circumstances may require; and when charged with a minor offense such person may be placed in arrest. Any person placed in arrest under the provisions of this article shall thereby be restricted to his barracks, quarters, or tent, unless such limits shall be enlarged by proper authority. Any officer who breaks his arrest or who escapes from confinement before he is set at liberty by proper authority shall be dismissed from the service or suffer such other punishment as a court-martial may direct; and any other person subject to military law who escapes from confinement or who breaks his arrest before

he is set at liberty by proper authority shall be punished as a court-martial may direct.

"ART. 70. INVESTIGATION OF AND ACTION UPON CHARGES.—No person put in arrest shall be continued in confinement more than eight days, or until such time as a court-martial can be assembled. When any person is put in arrest for the purpose of trial, except at remote military posts or stations, the officer by whose order he is arrested shall see that a copy of the charges on which he is to be tried is served upon him within eight days after his arrest, and that he is brought to trial within ten days thereafter, unless the necessities of the service prevent such trial; and then he shall be brought to trial within thirty days after the expiration of said ten days. If a copy of the charges be not served, or the arrested person be not brought to trial, as herein required, the arrest shall cease. But persons released from arrest, under the provisions of this article, may be tried, whenever the exigencies of the service shall permit, within twelve months after such release from arrest: *Provided*, That in time of peace no person shall, against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him.

"ART. 71. REFUSAL TO RECEIVE AND KEEP PRISONERS.—No provost marshal or commander of a guard shall refuse to receive or keep any prisoner committed to his charge by an officer belonging to the forces of the United States, provided the officer committing shall, at the time, deliver an account in writing, signed by himself, of the crime or offense charged against the prisoner. Any officer or soldier so refusing shall be punished as a court-martial may direct.

"ART. 72. REPORT OF PRISONERS RECEIVED.—Every commander of a guard to whose charge a prisoner is committed shall, within twenty-four hours after such confinement, or as soon as he is relieved from his guard, report in writing to the commanding officer the name of such prisoner, the offense charged against him, and the name of the officer committing him; and if he fails to make such report he shall be punished as a court-martial may direct.

"ART. 73. RELEASING PRISONER WITHOUT PROPER AUTHORITY.—Any person subject to military law who, without proper authority, releases any prisoner duly committed to his charge, or who through neglect or design suffers any prisoner so committed to escape, shall be punished as a court-martial may direct.

"ART. 74. DELIVERY OF OFFENDERS TO CIVIL AUTHORITIES.—When any person subject to military law, except one who is held by the military authorities to answer, or who is awaiting trial or result of trial, or who is undergoing sentence for a crime or offense punishable under these articles, is accused of a crime or offense committed within the geographical limits of the States of the Union and the District of Columbia, and punishable by the laws of the land, the commanding officer is required, except in time of war, upon application duly made, to use his utmost endeavor to deliver over such accused person to the civil authorities, or to aid the officers of justice in apprehending and securing him, in order that he may be brought to trial. Any commanding officer who upon such application refuses or willfully neglects, except in time of war, to deliver over such accused person to the civil authorities or to aid the officers of justice in apprehending and securing him shall be dismissed from the service or suffer such other punishment as a court-martial may direct.

"When, under the provisions of this article, delivery is made to the civil authorities of an offender undergoing sentence of a court-martial, such delivery, if followed by conviction, shall be held to interrupt the execution of the sentence of the court-martial, and the offender shall be returned to military custody, after having answered to the civil authorities for his offense, for the completion of the said court-martial sentence.

"E. WAR OFFENSES.

"ART. 75.—MISBEHAVIOR BEFORE THE ENEMY.—Any officer or soldier who misbehaves himself before the enemy, runs away, or shamefully abandons or delivers up any fort, post, camp, guard, or other command which it is his duty to defend, or speaks words inducing others to do the like, or casts away his arms or ammunition, or quits his post or colors to plunder or pillage, or by any means whatsoever occasions false alarms in camp, garrison, or quarters, shall suffer death or such other punishment as a court-martial may direct.

"ART. 76. SUBORDINATES COMPELLING COMMANDER TO SURRENDER.—If any commander of any garrison, fort, post, camp, guard, or other command is compelled, by the officers or soldiers under his command, to give it up to the enemy or to abandon it, the officers or soldiers so offending shall suffer death or such other punishment as a court-martial may direct.

"ART. 77. IMPROPER USE OF COUNTERSIGN.—Any person subject to military law who makes known the parole or countersign to any person not entitled to receive it according to the rules and discipline of war, or gives a parole or countersign different from that which he received, shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct.

"ART. 78. FORCING A SAFEGUARD.—Any person subject to military law who, in time of war, forces a safeguard shall suffer death or such other punishment as a court-martial may direct.

"ART. 79. CAPTURED PROPERTY TO BE SECURED FOR PUBLIC SERVICE.—All public property taken from the enemy is the property of the United States and shall be secured for the service of the United States, and any person subject to military law who neglects to secure such property or is guilty of wrongful appropriation thereof shall be punished as a court-martial may direct.

"ART. 80. DEALING IN CAPTURED OR ABANDONED PROPERTY.—Any person subject to military law who buys, sells, trades, or in any way deals in or disposes of captured or abandoned property, whereby he shall receive or expect any profit, benefit, or advantage to himself or to any other person directly or indirectly connected with himself, or who fails whenever such property comes into his possession or custody or within his control to give notice thereof to the proper authority and to turn over such property to the proper authority without delay, shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial, military commission, or other military tribunal may adjudge, or by any or all of said penalties.

"ART. 81. RELIEVING, CORRESPONDING WITH, OR AIDING THE ENEMY.—Whosoever relieves the enemy with arms, ammunition, supplies, money, or other thing, or knowingly harbors or protects or holds correspondence with or gives intelligence to the enemy, either directly or indirectly, shall suffer death, or such other punishment as a court-martial or military commission may direct.

"ART. 82. SPIES.—Any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be tried by a general court-martial or by a military commission, and shall, on conviction thereof, suffer death.

"F. MISCELLANEOUS CRIMES AND OFFENSES.

"ART. 83. MILITARY PROPERTY—WILLFUL OR NEGLIGENT LOSS, DAMAGE, OR WRONGFUL DISPOSITION.—Any person subject to military law who willfully, or through neglect, suffers to be lost, spoiled, damaged, or wrongfully disposed of,

any military property belonging to the United States shall make good the loss or damage and suffer such punishment as a court-martial may direct.

"ART. 84. WASTE OR UNLAWFUL DISPOSITION OF MILITARY PROPERTY ISSUED TO SOLDIERS.—Any soldier who sells or wrongfully disposes of or willfully or through nelgect injures or loses any horse, arms, ammunition, accouterments, equipment, clothing, or other property issued for use in the military service, shall be punished as a court-martial may direct.

"ART. 85. DRUNK ON DUTY.—Any officer who is found drunk on duty shall, if the offense be committed in time of war, be dismissed from the service and suffer such other punishment as a court-martial may direct; and if the offense be committed in time of peace, he shall be punished as a court-martial may direct. Any person subject to military law, except an officer, who is found drunk on duty shall be punished as a court-martial may direct.

"ART. 86. MISBEHAVIOR OF SENTINEL.—Any sentinel who is found drunk or sleeping upon his post, or who leaves it before he is regularly relieved, shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct; and if the offense be committed in time of peace, he shall suffer any punishment, except death, that a court-martial may direct.

"ART. 87. PERSONAL INTEREST IN SALE OF PROVISIONS.—Any officer commanding in any garrison, fort, barracks, camp, or other place where troops of the United States may be serving who, for his private advantage, lays any duty or imposition upon or is interested in the sale of any victuals or other necessaries of life brought into such garrison, fort, barracks, camp, or other place for the use of the troops, shall be dismissed from the service and suffer such other punishment as a court-martial may direct.

"ART. 88. INTIMIDATION OF PERSONS BRINGING PROVISIONS.—Any person subject to military law who abuses, intimidates, does violence to, or wrongfully interferes with any person bringing provisions, supplies, or other necessaries to the camp, garrison, or quarters of the forces of the United States shall suffer such punishment as a court-martial may direct.

"ART. 89. GOOD ORDER TO BE MAINTAINED AND WRONGS REDRESSED.—All persons subject to military law are to behave themselves orderly in quarters, garrison, camp, and on the march; and any person subject to military law who commits any waste or spoil, or willfully destroys any property whatsoever (unless by order of his commanding officer), or commits any kind of depredation or riot, shall be punished as a court-martial may direct. Any commanding officer who, upon complaint made to him, refuses or omits to see reparation made to the party injured, in so far as the offender's pay shall go toward such reparation, as provided for in article one hundred and five, shall be dismissed from the service, or otherwise punished, as a court-martial may direct.

"ART. 90. PROVOKING SPEECHES OR GESTURES.—No person subject to military law shall use any reproachful or provoking speeches or gestures to another; and any person subject to military law who offends against the provisions of this article shall be punished as a court-martial may direct.

"ART. 91. DUELLING.—Any person subject to military law who fights or promotes or is concerned in or connives at fighting a duel, or who having knowledge of a challenge sent or about to be sent fails to report the fact promptly to the proper authority shall, if an officer, be dismissed from the service or suffer such other punishment as a court-martial may direct; and if any other person subject to military law, shall suffer such punishment as a court-martial may direct.

"ART. 92. MURDER—RAPE.—Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial

may direct; but no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace.

[NOTE.—This article became effective on August 29, 1916.]

"ART. 93. VARIOUS CRIMES.—Any person subject to military law who commits mansalughter, mayhem, arson, burglary, robbery, larceny, embezzlement, perjury, assault with intent to commit any felony, or assault with intent to do bodily harm, shall be punished as a court-martial may direct.

"ART. 94. FRAUDS AGAINST THE GOVERNMENT.—Any person subject to military law who makes or causes to be made any claim against the United States or any officer thereof, knowing such claim to be false or fraudulent; or

"Who presents or causes to be presented to any person in the civil or military service thereof, for approval or payment, any claim against the United States, or any officer thereof, knowing such claim to be false or fraudulent; or

"Who enters into any agreement or conspiracy to defraud the United States by obtaining, or aiding others to obtain, the allowance or payment of any false or fraudulent claim; or

"Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or against any officer thereof, makes or uses, or procures, or advises the making or use of, any writing or other paper knowing the same to contain any false or fraudulent statements; or

"Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, makes, or procures, or advises the making of, any oath to any fact or to any writing or other paper knowing such oath to be false; or

"Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, forges or counterfeits, or procures, or advises the forging or counterfeiting of any signature upon any writing or other paper, or uses, or procures, or advises the use of any such signature, knowing the same to be forged or counterfeited; or

"Who, having charge, possession, custody, or control of any money or other property of the United States, furnished or intended for the military service thereof, knowingly delivers, or causes to be delivered, to any person having authority to receive the same, any amount thereof less than that for which he receives a certificate or receipt; or

"Who, being authorized to make or deliver any paper certifying the receipt of any property of the United States furnished or intended for the military service thereof, makes or delivers to any person such writing, without having full knowledge of the truth of the statements therein contained and with intent to defraud the United States; or

"Who steals, embezzles, knowingly and willfully misappropriates, applies to his own use or benefit, or wrongfully or knowingly sells or disposes of any ordnance, arms, equipments, ammunition, clothing, subsistence stores, money, or other property of the United States furnished or intended for the military service thereof; or

"Who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, or other person who is a part of or employed in said forces or service, any ordnance, arms, equipment, ammunition, clothing, subsistence stores, or other property of the United States, such soldier, officer, or other person not having lawful right to sell or pledge the same;

"Shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial may adjudge, or by any or all of said penalties. And if any person, being guilty of any of the offenses aforesaid while in the military service of the United States, receives his discharge or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial in the same manner and to the same extent as if he had not received such discharge nor been dismissed.

"ART. 95. CONDUCT UNBECOMING AN OFFICER AND GENTLEMAN.—Any officer or cadet who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service.

"ART. 96. GENERAL ARTICLE.—Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court.

"IV. COURTS OF INQUIRY.

"ART. 97. WHEN AND BY WHOM ORDERED.—A court of inquiry to examine into the nature of any transaction of or accusation or imputation against any officer or soldier may be ordered by the President or by any commanding officer; but a court of inquiry shall not be ordered by any commanding officer except upon the request of the officer or soldier whose conduct is to be inquired into.

"ART. 98. COMPOSITION.—A court of inquiry shall consist of three or more officers. For each court of inquiry the authority appointing the court shall appoint a recorder.

"ART. 99. CHALLENGES.—Members of a court of inquiry may be challenged by the party whose conduct is to be inquired into, but only for cause stated to the court. The court shall determine the relevancy and validity of any challenge, and shall not receive a challenge to more than one member at a time. The party whose conduct is being inquired into shall have the right to be represented before the court by counsel of his own selection, if such counsel be reasonably available.

"ART. 100. OATH OF MEMBERS AND RECORDERS.—The recorder of a court of inquiry shall administer to the members the following oath: 'You, A. B., do swear (or affirm) that you will well and truly examine and inquire, according to the evidence, into the matter now before you, without partiality, favor, affection, prejudice, or hope of reward. So help you God.' After which the president of the court shall administer to the recorder the following oath: 'You, A. B., do swear (or affirm) that you will, according to your best abilities, accurately and impartially record the proceedings of the court and the evidence to be given in the case in hearing. So help you God.'

"In case of affirmation the closing sentence of adjuration will be omitted.

"ART. 101. POWERS; PROCEDURE.—A court of inquiry and the recorder thereof shall have the same power to summon and examine witnesses as is given to courts-martial and the judge advocate thereof. Such witnesses shall take the same oath or affirmation that is taken by witnesses before courts-martial. A reporter or an interpreter for a court of inquiry shall, before entering upon his duties, take the oath or affirmation required of a reporter or an interpreter for a court-martial. The party whose conduct is being inquired into or his counsel, if any, shall be permitted to examine and cross-examine witnesses so as fully to investigate the circumstances in question.

"ART. 102. OPINION ON MERITS OF CASE.—A court of inquiry shall not give an opinion on the merits of the case inquired into unless specially ordered to do so.

"ART. 103. RECORD OF PROCEEDINGS—HOW AUTHENTICATED.—Each court of inquiry shall keep a record of its proceedings, which shall be authenticated by the signature of the president and the recorder thereof, and be forwarded to the convening authority. In case the record can not be authenticated by the recorder, by reason of his death, disability, or absence, it shall be signed by the president and by one other member of the court.

"V. MISCELLANEOUS PROVISIONS.

"ART. 104. DISCIPLINARY POWERS OF COMMANDING OFFICERS.—Under such regulations as the President may prescribe, and which he may from time to time revoke, alter, or add to, the commanding officer of any detachment, company, or higher command may, for minor offenses not denied by the accused, impose disciplinary punishments upon persons of his command without the intervention of a court-martial, unless the accused demands trial by court-martial.

"The disciplinary punishments authorized by this article may include admonition, reprimand, withholding of privileges, extra fatigue, and restriction to certain specified limits, but shall not include forfeiture of pay or confinement under guard. A person punished under authority of this article, who deems his punishment unjust or disproportionate to the offense may, through the proper channel, appeal to the next superior authority, but may in the meantime be required to undergo the punishment adjudged. The commanding officer who imposes the punishment, his successor in command, and superior authority shall have power to mitigate or remit any unexecuted portion of the punishment. The imposition and enforcement of disciplinary punishment under authority of this article for any act or omission shall not be a bar to trial by court-martial for a crime or offense growing out of the same act or omission; but the fact that a disciplinary punishment has been enforced may be shown by the accused upon trial, and when so shown shall be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty.

"ART. 105. INJURIES TO PERSON OF PROPERTY—REDRESS OF.—Whenever complaint is made to any commanding officer that damage has been done to the property of any person or that his property has been wrongfully taken by persons subject to military law, such complaint shall be investigated by a board consisting of any number of officers from one to three, which board shall be convened by the commanding officer and shall have, for the purpose of such investigation, power to summon witnesses and examine them upon oath or affirmation, to receive depositions or other documentary evidence, and to assess the damages sustained against the responsible parties. The assessment of damages made by such board shall be subject to the approval of the commanding officer, and in the amount approved by him shall be stopped against the pay of the offenders. And the order of such commanding officer directing stoppages herein authorized shall be conclusive on any disbursing officer for the payment by him to the injured parties of the stoppages so ordered.

"Where the offenders can not be ascertained, but the organization or detachment to which they belong is known, stoppages to the amount of damages inflicted may be made and assessed in such proportion as may be deemed just upon the individual members thereof who are shown to have been present with such organization or detachment at the time the damages complained of were inflicted as determined by the approved findings of the board.

"ART. 106. ARREST OF DESERTERS BY CIVIL OFFICIALS.—It shall be lawful for any civil officer having authority under the laws of the United States, or of any State, Territory, District, or possession of the United States, to arrest offenders, summarily to arrest a deserter from the military service of the United States and deliver him into the custody of the military authorities of the United States.

"ART. 107. SOLDIERS TO MAKE GOOD TIME LOST.—Every soldier who in an existing or subsequent enlistment deserts the service of the United States or without proper authority absents himself from his organization, station, or duty for more than one day, or who is confined for more than one day under sentence, or while awaiting trial and disposition of his case, if the trial results in conviction, or through the intemperate use of drugs or alcoholic liquor, or through disease or injury the result of his own misconduct, renders himself unable for more than one day to perform duty, shall be liable to serve, after his return to a full-duty status, for such period as shall, with the time he may have served prior to such desertion, unauthorized absence, confinement, or inability to perform duty, amount to the full term of that part of his enlistment period which he is required to serve with his organization before being furloughed to the Army reserve.

"ART. 108. SOLDIERS—SEPARATION FROM THE SERVICE.—No enlisted man, lawfully inducted into the military service of the United States, shall be discharged from said service without a certificate of discharge, signed by a field officer of the regiment or other organization to which the enlisted man belongs or by the commanding officer when no such field officer is present; and no enlisted man shall be discharged from said service before his term of service has expired, except by order of the President, the Secretary of War, the commanding officer of a department, or by sentence of a general court-martial.

"ART. 109. OATH OF ENLISTMENT.—At the time of his enlistment every soldier shall take the following oath or affirmation: 'I, ———, do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to the Rules and Articles of War.' This oath or affirmation may be taken before any officer.

"ART. 110. CERTAIN ARTICLES TO BE READ AND EXPLAINED.—Articles one, two, and twenty-nine, fifty-four to ninety-six, inclusive, and one hundred and four to one hundred and nine, inclusive, shall be read and explained to every soldier at the time of his enlistment or muster in, or within six days thereafter, and shall be read and explained once every six months to the soldiers of every garrison, regiment, or company in the service of the United States.

"ART. 111. COPY OF RECORD OF TRIAL.—Every person tried by a general court-martial shall, on demand therefor, made by himself of by any person in his behalf, be entitled to a copy of the record of the trial.

"ART. 112. EFFECTS OF DECEASED PERSONS.—DISPOSITION OF—In case of the death of any person subject to military law, the commanding officer of the place or command will permit the legal representative or widow of the deceased, if present, to take possession of all his effects then in camp or quarters, and if no legal representative or widow be present, the commanding officer shall direct a summary court to secure all such effects; and said summary court shall have authority to convert such effects into cash, by public or private sale, not earlier than thirty days after the death of the deceased, and to collect and receive any debts due decedent's estate by local debtors; and as soon as practicable after converting such effects into cash said summary court shall deposit

with the proper officer, to be designated in regulations, any cash belonging to decedent's estate, and shall transmit a receipt for such deposit, accompanied by any will or other papers of value belonging to the deceased, an inventory of the effects secured by said summary court, and a full account of his transactions to the War Department for transmission to the Auditor for the War Department for action as authorized by law in the settlement of the accounts of deceased officers or enlisted men of the Army; but if in the meantime the legal representative, or widow, shall present himself or herself to take possession of decedent's estate, the said summary court shall turn over to him or her all effects not sold and cash belonging to said estate, together with an inventory and account, and make to the War Department a full report of his transactions.

"The provisions of this article shall be applicable to inmates of the United States Soldiers' Home who die in any United States military hospital outside of the District of Columbia where sent from the home for treatment.

"ART. 113. INQUESTS.—When at any post, fort, camp, or other place garrisoned by the military forces of the United States and under the exclusive jurisdiction of the United States, any person shall have been found dead under circumstances which appear to require investigation, the commanding officer will designate and direct a summary court-martial to investigate the circumstances attending the death; and, for this purpose, such summary court-martial shall have power to summon witnesses and examine them upon oath or affirmation. He shall promptly transmit to the post or other commander a report of his investigation and of his findings as to the cause of the death.

"ART. 114. AUTHORITY TO ADMINISTER OATHS.—Any judge advocate or acting judge advocate, the president of a general or special court-martial, any summary court-martial, the judge advocate or any assistant judge advocate of a general or special court-martial, the president or the recorder of a court of inquiry or of a military board, any officer designated to take a deposition, any officer detailed to conduct an investigation, and the adjutant of any command shall have power to administer oaths for the purposes of the administration of military justice and for other purposes of military administration; and in foreign places where the Army may be serving shall have the general powers of a notary public or of a consul of the United States in the administration of oaths, the execution and acknowledgment of legal instruments, the attestation of documents, and all other forms of notarial acts to be executed by persons subject to military law.

"ART. 115. APPOINTMENT OF REPORTERS AND INTERPRETERS.—Under such regulations as the Secretary of War may from time to time prescribe, the president of a court-martial or military commission, or a court of inquiry shall have power to appoint a reporter, who shall record the proceedings of and testimony taken before such court or commission and may set down the same, in the first instance, in shorthand. Under like regulations the president of a court-martial or military commission, or court of inquiry, or a summary court, may appoint an interpreter, who shall interpret for the court or commission.

"ART. 116. POWERS OF ASSISTANT JUDGE ADVOCATES.—An assistant judge advocate of a general court-martial shall be competent to perform any duty devolved by law, regulation, or the custom of the service upon the judge advocate of the court.

"ART. 117. REMOVAL OF CIVIL SUITS.—When any civil or criminal prosecution is commenced in any court of a State against any officer, soldier, or other person in the military service of the United States on account of any act done under color of his office or status, or in respect to which he claims any right, title, or authority under any law of the United States respecting the military

forces thereof, or under the law of war, such suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court of the United States in the district where the same is pending in the manner prescribed in section thirty-three of the Act entitled 'An Act to codify, revise, and amend the laws relating to the judiciary,' approved March three, nineteen hundred and eleven, and the cause shall thereupon be entered on the docket of said district court and shall proceed therein as if the cause had been originally commenced in said district court and the same proceedings had been taken in such suit or prosecution in said district court as shall have been had therein in said State court prior to its removal, and said district court shall have full power to hear and determine said cause.

"ART. 118. OFFICERS, SEPARATION FROM SERVICE.—No officer shall be discharged or dismissed from the service except by order of the President or by sentence of a general court-martial; and in time of peace no officer shall be dismissed except in pursuance of the sentence of a court-martial or in mitigation thereof; but the President may at any time drop from the rolls of the Army any officer who has been absent from duty three months without leave or who has been absent in confinement in a prison or penitentiary for three months after final conviction by a court of competent jurisdiction.

"ART. 119. RANK AND PRECEDENCE AMONG REGULARS, MILITIA, AND VOLUNTEERS.—That in time of war or public danger, when two or more officers of the same grade are on duty in the same field, department, or command, or of organizations thereof, the President may assign the command of the forces of such field, department, or command, or of any organization thereof, without regard to seniority of rank in the same grade. In the absence of such assignment by the President, officers of the same grade shall rank and have precedence in the following order, without regard to date of rank or comission as between officers of different classes, namely: First, officers of the Regular Army and officers of the Marine Corps detached for service with the Army by order of the President; second, officers of forces drafted or called into the service of the United States; and, third, officers of the volunteer forces: *Provided*, That officers of the Regular Army holding commissions in forces drafted or called into the service of the United States or in the volunteer forces shall rank and have precedence under said commissions as if they were commissions in the Regular Army; the rank of officers of the Regular Army under commissions in the National Guard as such shall not, for the purposes of this article, be held to antedate the acceptance of such officers into the service of the United States under said commissions.

"ART. 120. COMMAND WHEN DIFFERENT CORPS OR COMMANDS HAPPEN TO JOIN.—When different corps or commands of the military forces of the United States happen to joint or do duty together the officer highest in rank of the line of the Regular Army, Marine Corps, forces drafted or called into the service of the United States, or Volunteers, there on duty, shall, subject to the provisions of the last preceding article, command the whole and give orders for what is needful in the service, unless otherwise directed by the President.

"ART. 121. COMPLAINTS OF WRONGS.—Any officer or soldier who believes himself wronged by his commanding officer, and, upon due application to such commander, is refused redress, may complain to the general commanding in the locality where the officer against whom the complaint is made is stationed. The general shall examine into said complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, transmit to the Department of War a true statement of such complaint, with the proceedings had thereon."

SEC. 4. The provisions of section three of this Act shall take effect and be in force on and after the first day of March, nineteen hundred and seventeen: *Provided*, That articles four, thirteen, fourteen, fifteen, twenty-nine, forty-seven, forty-nine, and ninety-two shall take effect immediately upon the approval of this Act.

SEC. 5. That all offenses committed and all penalties, forfeitures, fines, or liabilities incurred prior to the taking effect of this Act, under any law embraced in or modified, changed, or repealed by this Act, may be prosecuted, punished, and enforced in the same manner and with the same effect as if this Act had not been passed.

SEC. 6. All laws and parts of laws in so far as they are inconsistent with this Act are hereby repealed.

Act of August 29, 1916 (39 Stat., 650–670.)

APPENDIX 3.

(FRONT.)

Charge sheet. No. in summary court record ——.

(Place) (Date)

(Surname.) (Christian name.) (Rank and organization.)

Date current enlistment, ——————. Rate of pay, ——.

Previous service, ——————

(Give dates, with character given on each discharge.)

Date of { Arrest:——————. Confinement:——————. No. of previous convictions,——————.

Witnesses:

—— ——.

—— ——.

CHARGE—: Violation of the —— article of war.

Specification—: In that, etc.

Form No. 594, A. G. O.

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[BACK.]

Pleas: ——————.

Findings: ——————.

Sentence: ——————.

Days in { Arrest: ——————. Confinement: ——————.

Maximum punishment:——————.

NOTE.—The above spaces are intended only for use for record purposes at the headquarters of the officer appointing the special or general court-martial, and it is not intended that they shall be filled in by summary courts, trial judge advocates, etc.

INSTRUCTIONS.

(M. C. M., pars. 75, 76, 79, 306.)

1. Submission of charges.—All charges for trial by court-martial will be prepared in triplicate, using the prescribed charge sheet as a first sheet and using such additional sheets of ordinary paper as are required. They will be accompanied—

(a) Except when trial is to be had by summary court, by a brief statement of the substance of all material testimony expected from each material witness, both those for the prosecution and those for the defense, together with all available and necessary information as to any other actual or probable testimony or evidence in the case; and

(b) In the case of a soldier, by properly authenticated evidence of convictions, if any, of an offense or offenses committed by him during his current enlistment and within one year next preceding the date of the alleged commission by him of any offense set forth in the charges.

They will be forwarded by the officer preferring them to the officer immediately exercising summary court-martial jurisdiction over the command to

which the accused belongs, and will by him and by each superior commander into whose hands they may come either be referred to a court-martial within his jurisdiction for trial, forwarded to the next superior authority exercising court-martial jurisdiction over the command to which the accused belongs or pertains, or otherwise disposed of as circumstances may appear to require.

2. Investigation of charges.—If the officer immediately exercising summary court-martial jurisdiction over the command to which the accused belongs or pertains decides to forward the charges to superior authority, he will, before so doing, either carefully investigate them himself or will cause an officer other than the officer preferring the charges carefully to investigate them and to report to him, orally or otherwise, the result of such investigation. The officer investigating the charges will afford to the accused an opportunity to make any statement, offer any evidence, or present any matter in extenuation that he may desire to have considered in connection with the accusations against him. If the accused desires to submit nothing, the indorsement will so state. In his indorsement forwarding the charges to superior authority he will include:

(a) The name of the officer who investigated the charges;

(b) The opinion of both such officers and himself as to whether the several charges can be sustained;

(c) The substance of such material statement, if any, as the accused may have voluntarily made in connection with the case during the investigation thereof;

(d) A summary of the extenuating circumstances, if any, connected with the case; and

(e) His recommendation of action to be taken.

3. Disposition of copies of charges.—(a) When trial is had by summary court the charges will be completed as the record of trial, a copy thereof will be completed as a copy of the summary court record for the company or other commander, and the other copy will, with the least practicable delay after action has been taken on the sentence, be completed and transmitted as the required report of trial to the officer exercising general court-martial jurisdiction over the command, there to be filed in the office of the judge advocate for a period of two years, at the end of which time it may be destroyed; and

(b) When trial is to be had by special or general court-martial the charges and one copy thereof will be referred to the trial judge advocate; the copy to be furnished by him to the accused or his counsel, and the other copy will be used for record purposes in the office of the officer appointing the trial court, the top fold of the copy of the charge sheet, in case of trial by general court-martial, being detached at the proper time and forwarded with the record of trial to the Judge Advocate General of the Army.

4. Disposition of evidence of previous convictions.—(a) The evidence of a previous conviction referred to a summary court or to the judge advocate of a special court will, after trial, be returned by him to the appointing authority and will, after action by the latter on the case, be returned to the company or detachment to which it pertains;

(b) The evidence of a previous conviction referred to the judge advocate of a general court-martial will, if a company record, after trial be returned by him direct to the company or detachment to which it pertains, and a certified copy thereof will be attached to the record of trial.

NOTE.—This form supersedes the blank form for record of trial by summary court (Form No. 99, A. G. O.), the blank form for report of trial by summary court (Form No. 59, A. G. O.), and the blank form for statement of service (Form No. 15, A. G. O.).